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TRADE AND DEVELOPMENT BOARD
Commission on Investment, Technology
and Related Financial Issues
Expert Meeting on Competition Law and Policy
Geneva, 13 November 1996
Item 2 of the provisional agenda

ADOPTION OF THE AGENDA AND ORGANIZATION OF WORK

Provisional agenda and annotations

I. PROVISIONAL AGENDA

1. Election of officers

2. Adoption of the agenda and organization of work

3. Consultations on competition law and policy, including the Model Law and studies related to the provisions of the Set of Principles and Rules

4. Work programme, including technical assistance, advisory and training programmes on competition law and policy

5. Provisional agenda for the second session of the Expert Meeting

6. Other business

7. Adoption of the report of the Expert Meeting on its first session.

GE.96-51528 (E)

II. ANNOTATIONS TO THE PROVISIONAL AGENDA

Item 1. Election of officers

In keeping with the cycle of rotation for the election of Chairman and Rapporteur followed by the former Intergovernmental Group of Experts on Restrictive Business Practices, and taking into account the fact that the President of the Third United Nations Conference to Review All Aspects of the Set (13-21 November 1995) was from Latin America, it is proposed that the Chairman for the first session of the Expert Meeting on Competition Law and Policy be elected from Group B and the Rapporteur from Group C (Latin America). Three Vice-Chairmen would be elected as follows: one from Group A (Asia and Africa), one from Group B and one from Group D.

Item 2. Adoption of the agenda and organization of work

In line with paragraph 114 of the Midrand Declaration 1/ the Expert Meeting on Competition Law and Policy shall have a duration of three days. It is therefore suggested that the first plenary meeting on 13 November 1996 be opened at 10 a.m. sharp and be devoted to procedural matters (items 1 and 2) and to introductory statements. The closing plenary meeting, on 15 November, would be devoted to the work programme (item 4), provisional agenda for the second session of the Expert Meeting (item 5), other business (item 6) and adoption of the report (item 7). 2/

This would leave the remaining meetings, from the afternoon of 13 November to the morning of 15 November, for consultations on competition law and policy, including studies related to the provisions of the Set of Principles and Rules (item 3).

Item 3. Consultations on competition law and policy, including the Model Law and studies related to the provisions of the Set of Principles and Rules

In paragraph 9 of the resolution adopted by the Third United Nations Conference to Review All Aspects of the Set (the Third Review Conference) at its closing meeting, on 21 November 1995, the Review Conference decided that:

> "(a) Future Intergovernmental Group of Experts sessions should include at least three days for informal multilateral consultations among participants on competition law and policy issues with special focus on practical cases. Countries wishing to participate in the consultations are encouraged to give advance notice of their proposed RBP issues, in order to maximize the opportunities for exchange of views and experiences with member countries. After an understanding is reached as to the subject-matter of the consultations, a detailed agenda and timetable for the consultations should be disseminated by the secretariat at least one month in advance of the session of the Intergovernmental Group of Experts so as to permit delegations from all member States to participate in the informal consultations, and the likelihood of participation in the consultations by competition experts from all regions should be ascertained;

"(b) As part of such consultations, the Intergovernmental Group of Experts should undertake a comprehensive informal exchange of views and experiences of several developed and other interested countries on issues relating to cases concerning RBPs and other issues relevant to competition which have been raised by developing or other countries;

"(c) Also as part of such consultations, the Intergovernmental Group of Experts should organize several small workshops at which the secretariat and a few experts from developed and other countries would exchange informally views and experiences with developing and other countries wishing to take advantage of such an exchange of views for the purpose of developing their analysis of specific restrictive business practices issues in a given country."

When the resolution was adopted, the Third Review Conference obviously considered that future sessions would continue to have a five-day duration. But in view of the provisions of the Midrand Declaration that henceforth expert meetings should last for a maximum of three days, it is suggested that the consultations on item 3 could be of a full two-day duration. Countries, especially developing and least developed countries, are invited to make known as soon as possible their proposals for subjects for consultations, in order for the secretariat to be able to prepare a detailed agenda and timetable for the consultations, and to disseminate it in good time, as requested in the resolution.

In line with the request contained in paragraph 9 (c) of the same resolution, small workshops could be organized during which the secretariat and a few experts from developed and other countries would exchange informally views and experiences with developing and other countries.

Also, under this item, the secretariat was requested by the Third Review Conference to "revise documents TD/RBP/CONF.4/2, TD/RBP/CONF.4/6, TD/RBP/CONF.4/7, TD/RBP/CONF.4/8, TD/B/RBP/81/Rev.4 and UNCTAD/ITD/15, in the light of comments by member States made at the Conference or to be sent in writing by 31 January 1996 for submission to the next session of the IGE (para. 1 of the resolution). For reasons of limitation of the number of reports submitted to expert meetings (only two documents will be submitted to such meetings), under this agenda item, the experts will have before them a revised version of document TD/RBP/CONF.4/8 (see TD/B/COM.2/EM/2) and a note (TD/COM.2/EM/3) containing (i) extracts of the comments received by the secretariat, in response to the request above, and (ii) "a draft outline of a possible study on empirical evidence of the benefits (including the benefits for consumers) to be gained by developing and least developed countries and countries in transition from applying competition law and policy principles to economic development in order to attain greater efficiency in international trade and development", as requested by the Third Review Conference (para. 8 of the resolution). 3/

Item 4. Work programme, including technical assistance, advisory and training programmes on competition law and policy

Under this item, the Expert Meeting on Competition Law and Policy is expected to give guidance to the UNCTAD secretariat as to further work it is requested to undertake.

In particular, the Expert Meeting will have before it a progress report on "a review of technical cooperation activities undertaken by UNCTAD and other intergovernmental organizations, as well as States bilaterally, with a view to strengthening its ability to provide technical assistance for capacity-building in the area of competition law and policy", in line with the request contained in paragraph 4 of the resolution adopted by the Third Review Conference. This will be contained in part (iii) of the note (TD/COM.2/EM/3) prepared by the secretariat.

On the basis of the preliminary version of the review of technical cooperation, the Expert Meeting is expected to decide on ways and means to implement the points made by the Third Review Conference in the same resolution (para. 4) as follows:

(a) Encouraging providers and recipients of technical cooperation to take into account the results of the substantive work done by UNCTAD in the above-mentioned areas in determining the focus of their cooperation activities;

(b) Encouraging developing countries and countries in transition to identify specific competition law and policy areas and issues which they would wish to see receive priority attention in the implementation of technical cooperation activities;

(c) Identifying common problems encountered in the competition law and policy area which might receive attention in national and regional seminars;

(d) Enhancing cost-effectiveness, complementarity and collaboration among providers and recipients of technical cooperation, both in terms of the geographical focus of technical cooperation activities, taking into account the special needs of African countries, and the nature of cooperation undertaken;

(e) Preparation and execution of national, regional and subregional projects on technical cooperation and training in the field of competition law and policy, taking special account of those countries, or subregions which have not received such assistance so far, especially in the field of law drafting and staff training, and enforcement capacity;

(f) Mobilizing resources and widening the search for potential donors for UNCTAD technical cooperation in this area.

Item 5. Provisional agenda for the second session of the Expert Meeting

Assuming that the Expert Meeting will recommend to the Commission on Investment, Technology and Related Financial Issues that it convene a second session in 1997, the UNCTAD secretariat will submit during the session a draft provisional agenda for the second session of the Expert Meeting on Competition Law and Policy.

Item 6. Other business

Item 7. Adoption of the report of the Expert Meeting on its first session

It is recalled that UNCTAD IX in the Midrand Declaration decided that the newly established Commission on Investment, Technology and Related Financial Issues would deal, inter alia, with the work on competition, as set out in paragraph 91 (iii) of the Midrand Declaration, namely:

> "Examining issues related to competition law of particular relevance to development: continuing analytical work on restrictive business practices; assisting (...) countries to formulate competition policies and legislation; institution-building; focusing on Africa by holding a regional meeting, creating relevant inventories and databases, and establishing a technical cooperation programme."

Hence, the Trade and Development Board, at its thirteenth executive session, held on 8 July 1996, decided that one item on the agenda of the first session of the Commission would be devoted to "Issues related to competition law of particular relevance to development" (item 4). Under that item of its agenda, "The Commission will focus on examining issues related to the subject: continuing analytical work on restrictive business practices and assistance in formulating competition policies and legislation. To facilitate the discussion, experts will prepare a report."

As requested by the Board, the Expert Meeting on Competition Law and Policy will report to the Commission on Investment, Technology and Related Financial Issues, which is scheduled to take place during the week of 18-22 November, immediately following the Expert Meeting. Accordingly, the Chairman of the Expert Meeting on Competition Law and Policy, or a representative designated by him, will report to the Commission on the first session of the Expert Meeting and participate in the discussion, as appropriate.

Notes

1/ Document TD/377.

2/ In view of the short duration of the session, the Rapporteur would be authorized to complete the final report after the close of the session.

3/ It should be noted that recurrent documents, such as the Handbook of Competition Legislations and the Directory of Competition Authorities will continue to be published by the UNCTAD secretariat, but as non-sessional documents. A limited number of these will hopefully be available in their preliminary form during the Expert Meeting.

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TRADE AND DEVELOPMENT BOARD

Commission on Investment, Technology
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Geneva, 13 November 1996
Item 3 of the provisional agenda

CONSULTATIONS ON COMPETITION LAW AND POLICY, INCLUDING THE MODEL LAW AND STUDIES RELATED TO THE PROVISIONS OF THE SET OF PRINCIPLES AND RULES

Strengthening the implementation of the Set

The scope, coverage and enforcement of competition laws and policies and analysis of the provisions of the Uruguay Round Agreements relevant to competition policy, including their implications for developing and other countries

Study by the UNCTAD secretariat*

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* This is a revised version of TD/B/RBP/CONF.4/8. Additions are shown in bold type. Deletions are indicated by an asterisk.

GE.96-51521 (E)

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SUMMARY AND CONCLUSIONS

1. In recent years, there has been a trend towards convergence in the scope, coverage and enforcement of competition laws and policies worldwide. This is due to: the widespread trend towards liberalization of markets and adoption of competition policies; greater emphasis upon consumer welfare, efficiency and competitiveness objectives in the provisions or application of competition laws; greater similarity in economic analyses and enforcement techniques; the universal condemnation of collusive practices (subject to certain exemptions in some countries); the limitation, elimination or abuse control of sectoral, personal or Government-connected exemptions; tightening up of enforcement; a more prominent role for competition authorities in advocating competition principles in the application of other governmental policies; the applicability of competition laws to RBPs outside national territory; and the strengthening of international consultations and cooperation.

2. However, there remain many important differences among competition laws and policies, including in: the priority attached to competition policy vis-à-vis other policies; the importance attached to objectives other than consumer welfare or efficiency under many competition laws; legal approaches to the control of RBPs; analytical techniques utilized; substantive rules applicable in particular to vertical restraints, abuses of dominant positions, mergers, joint ventures and interlocks; the structure or scope of de minimis, functional, intellectual property or other types of exemptions indicated above (although some of these may not really be exemptions, but inherent to the normal application of competition principles); enforcement capabilities and actual strength of enforcement; the legal doctrines under which competition laws are applied outside national territory; the actual ability to apply them or frequency of application; the extent to which different countries participate in international cooperation in this area; and regulatory restrictions upon market entry. Despite these differences, there are now sufficient broad similarities in the objectives, content and application of competition laws and policies to form the substantive basis for strengthened cooperation.

3. Moreover, a strong impetus towards the strengthening of convergence and of international consultations and cooperation mechanisms in this area has been provided by the Uruguay Round Agreements. The extent to which the rules of the international trading system cover conduct by enterprises has been substantially increased, although Governments remain the direct addressees of trade rules. Contracting parties to the Agreements have undertaken legally binding commitments to control private restraints on trade (in some areas such as services), or not to encourage or support such restraints (in other areas such as safeguards), with the primary objective of improving market access for the firms of other contracting parties, or of otherwise furthering their trade interests. Consultation obligations relating to RBPs in international trade have been extended. There are also significant provisions relating to the consideration of competition factors in the implementation of trade measures by Governments, such as anti-dumping or countervail of subsidies.

4. The further reduction of private barriers to market access (for producers and consumers from both exporting and importing countries) and to market entry would be a logical step in the progressive liberalization of international

trade, and would enhance global economic efficiency, growth and consumer welfare while reducing trade or competition policy tensions. Action in this area may be particularly desirable because the Uruguay Round Agreements' tightening-up of controls over trade restrictions by Governments, **while generally increasing potential competition in international markets,** may * **lead** enterprises to **increase efforts to circumvent the effects of trade liberalization through resort to RBPs.** Globalization and technological trends may also lead to new types of RBPs across borders, **whose effects may be reinforced by the continuing trend towards international mergers, joint ventures and strategic alliances.** But to consolidate and expand upon the progress achieved by the Agreements in a balanced manner, complementary mechanisms are needed as well to encourage trade regimes to take greater account of competition and consumer welfare concerns, so as to mitigate protectionist or pro-producer behaviour in such areas as anti-dumping, countervail of subsidies, and safeguards. The strengthening of "safeguard" mechanisms to protect competition and prevent abuses within the rules of the international trading system would encourage trade liberalization. This would support and complement efforts made by competition authorities at the national level to advocate trade liberalization.

5. To face the new challenges in this area, and to encourage better mutual understanding and possible convergence in competition laws and policies, it would be desirable to strengthen consultations **(taking into account confidentiality issues)** and cooperation among competition authorities within the framework of the Set of Principles and Rules (possibly eventually complemented by further guidelines). Technical cooperation could also be addressed in this framework.

6. **The need to take action in the area of RBP control (but not in respect of competition aspects of trade rules) has been recognized by the European Commission, which has suggested that a WTO Working Party be established to explore the development of an international framework of competition rules linked to the trading system, and that OECD and UNCTAD be requested to pursue their work on trade and competition taking account of developments in WTO.**

INTRODUCTION

7. The present draft study * **constitutes a revised version of a study** prepared by the UNCTAD secretariat in accordance with the agreed conclusions adopted by the Intergovernmental Group of Experts on Restrictive Business Practices at its fourteenth session. 1/ It is based on the outline of the study which was presented to that session of the Group, 2/ taking into account comments made by delegations on the outline. **The current revision has been undertaken as requested by the Third United Nations Conference to Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, and takes into account the comments made by Governments on the study during the Review Conference, 3/ as well as written comments sent thereafter. 4/** Given the wide subject-matter of the study, it does not aim to provide a detailed description of the scope, coverage and enforcement of competition laws, but rather to sketch a broad and selective picture. A background paper to this study 5/ describes some basic features of the scope, coverage and enforcement of competition laws and policies which have not been dealt with in the present paper because of space limitations. However, the summary and conclusions in the present paper take into account the findings from the background paper.

8. The present paper is composed of five chapters, the first four of which deal with the scope, coverage and exemptions of competition laws and policies in respect of subject-matter, persons and geographical coverage. Chapter I describes some complete or partial de minimis, functional, rule of reason and sectoral exemptions from the application of competition laws. Chapter II describes the application of selected competition laws to some types of entities, as well as to national and foreign governmental entities, public enterprises (PEs) and persons receiving authorization or permission from Governments. Chapter III describes the exemptions granted in respect of the exercise of intellectual property rights, which are treated separately since they are exemptions of both a subject-matter and a personal nature (involving the grant of types of exclusive rights to different persons by the State). Chapter IV describes the geographical scope of application of competition laws, including their application overseas, and their treatment of RBPs originating from national territory affecting foreign markets. Chapter V describes and analyses the implications of some provisions of the different Uruguay Round Agreements relating to the state of competition within domestic markets, or relevant to the scope, coverage and enforcement of competition laws, and makes suggestions for further action.

Chapter I

EXEMPTIONS

A. Overview

9. The term "exemption" is used throughout this study in a broad sense to include: (a) partial or complete exceptions or exclusions from the application of the competition law, whether these exceptions are written into the competition law itself or result from the provisions of other laws or from judicial doctrines; (b) special rules which, although different from the ordinary competition rules, none the less operate within the general framework of these rules; and (c) "block" or individual exemptions granted by competition authorities, other governmental agencies or courts in the exercise of their discretion to exempt or in the application of the rule of reason. Exemptions may not necessarily constitute a non-application or weakening of normal competition principles, but may follow from the normal application of principles of competition and efficiency to the specific features of minor transactions types of practices, functions (such as research), sectors, intellectual property or entities, including entities linked with governments. They may also be intended to increase the predictability of the competition rules applicable to that sector. Exemptions are granted most frequently where there are special circumstances suggesting that competition would not ensure an efficient outcome in the relevant product market (i.e. market failure), or where socio-economic or political considerations other than economic efficiency have been taken into account, such as unemployment, or industrial or agricultural policy. In practice, the line between those exemptions granted to promote pro-competitive efficiency and those granted for industrial policy reasons may also be blurred.

10. The true extent to which exemptions are granted cannot be determined simply from legislative texts; enforcement policies and techniques, case-law, and administrative practices also need to be taken into account. Even in the absence of an explicit exemption in a competition law, non-enforcement (or relaxed enforcement) of the law may have the same result. Decisions taken after economic analysis in individual cases may also achieve the same result, particularly if the competition authority or the courts have a considerable discretionary power. The differences between laws and enforcement techniques used under different legal systems are relevant here. Under the "rule of reason" approach utilized by the United States and some other countries, mainly with a common law background, most practices (other than a few practices which are prohibited per se) are forbidden only if their anti-competitive effects outweigh any competitive benefits resulting therefrom. Under the "prohibition" approach adopted by most civil law countries, on the other hand, the competition law forbids a number of practices in principle, but then provides for exemptions in specified circumstances; competition authorities have the authority to decide whether or not a practice in an individual case falls within the terms of these exemptions, and may also have the authority to grant lock exemptions for some practices or some sectors. Article 85 of the Treaty of Rome, for instance, prohibits agreements, decisions and concerted practices affecting trade between Member States and restricting or distorting competition. However, these may be exempted if they contribute to improving the production or

distribution of goods or to promoting technical or economic progress and allow consumers a fair share of the resultant benefit and do not impose restrictions which are not indispensable to achieve the benefit sought, or afford the possibility of eliminating competition in respect of a substantial part of the products in question. A number of block exemptions have been issued, and exemptions are also frequently granted in individual cases.

11. In practice, the differences among these approaches are not as great as would appear at first sight. Moreover, there is a general trend towards the uniform and universal application of competition policy throughout an economy. Increasingly, many countries are allowing exemptions only where and to the extent necessary to achieve the regulatory purpose (as interpreted from the regulated conduct clearly specified in the relevant legislation); separating market from non-market activities, and fully applying competition laws to the former; controlling abuses; and trying to ensure that the regulatory scheme causes the least harm to economic efficiency and provides the least possibility to commit abuses, in the light of changing economic and technological conditions. It is now relatively rare for entire sectors to be exempted, and there is often a residual area where competition authorities have a role to play; broad exemptions for certain activities within a sector may be combined with the full application of competition law or limited exemptions in respect of other activities within that sector. In Chile, for instance, on its enactment, the competition law 6/ repealed all incompatible laws and regulatory and administrative provisions, except for restrictions imposed or authorized by pre-existing laws in the fields of intellectual property, the production of and trade in petroleum, saltpetre, iodine and copper, the creation and functioning of public enterprises (PEs), banking, transport, chartering and coastal traffic, and some other areas. However, this does not mean that the competition law is not applied to these fields, but rather that the specific restrictions permitted in these fields under previous laws are respected.

B. De minimis and functional exemptions

12. De minimis exemptions are those which are granted for transactions involving firms with turnover or market share below a certain threshold, which are not considered to affect competition significantly enough to make it necessary for the law to be made applicable to them or to be applied by them. The types or the threshold for de minimis exemptions vary, and the threshold may sometimes be quite high. * Functional exemptions are those granted for certain activities, usually of a horizontal nature. In the application of the French competition law, 7/ for example, price-fixing arrangements are presumed to be anti-competitive, but they would be exempted if the enterprises concerned are sharing a common property or resource, or are marketing a collective creation. Both types of exemptions are granted under many competition laws, either by the express terms of the law or through its enforcement under the rule of reason. They can sometimes be combined where, for example, certain activities of SMEs are exempted. The Venezuelan law, 8/ which prohibits RBPs in terms similar to the Treaty of Rome, exempts inter alia activities relating to standardization, R & D, and specialization. De minimis exemptions are also granted to concerted activities among competitors when not more than 15 per cent of the market is affected and when the participating enterprises have a turnover of less than a certain sum.

13. Specialization and rationalization arrangements are exempted under several laws provided each party maintains its freedom to determine pricing and business strategies. In * Germany * , **for instance,** 9/ cartels or other horizontal arrangements may be authorized, on a temporary or an indefinite basis, to rationalize activities, because of crisis conditions or a depression or recession in an industry, to increase the bargaining power of a number of weak SMEs vis-à-vis dominant suppliers or purchasers, or because of economic or other public interest considerations. But even in the grant of such authorizations, care may be taken to minimize adverse effects upon competition. * **P**articipants in rationalization agreements, **for instance,** must be able to demonstrate that these will rationalize economic activities and will be likely to substantially increase the efficiency or productivity of the participating enterprises and thereby improve the satisfaction of demand, and the rationalization effect must also be adequate in relation to the restraint of competition. Even after being legalized, rationalization agreements (like other authorized horizontal arrangements) are subject to controls in case of abuse, and they must not violate principles concerning trade in goods and services accepted by Germany in international treaties. **In Japan, there were 55 systems for cartels exempted from application of the Antimonopoly Act as of 31 December 1995; however, the number of systems in use has decreased considerably in recent years.** 10/ **Even in the areas where exemption cartels are allowed, the AMA would be applied to those cases in which unfair trade practices are applied, or competition in any particular field of trade is substantially restrained, resulting in an unjust price rise.**

14. In the United States, a rule of reason analysis is applied to joint ventures (as long as they are not merely devices to facilitate cartels). If both parties would have entered the market alone but for the venture, it would be considered to be anti-competitive; if neither party would have otherwise entered into the market, it would be considered to be pro-competitive. It is specifically provided by statute that R & D joint ventures are to be examined under a rule of reason standard, and they are exempted from claims for treble damages, provided that notification of the venture has been made to the competition authorities; in practice, research joint ventures have rarely been found to infringe the competition rules. Similar treatment is granted for production joint ventures, subject to the additional conditions that the principal production facilities of the venture are located in the United States and that the parties are companies from the United States or from countries that treat United States companies fairly under their competition laws governing joint production ventures. 11/

15. The provisions relating to horizontal arrangements under the European Union rules are substantially different from those in the United States competition laws, but the difference is less in enforcement practice. However, compared to United States law, the treatment of horizontal restraints and joint ventures under European Union law appears to be conducted on a more discretionary and flexible basis, with greater willingness to take into account efficiency and industrial policy considerations. Block exemptions are provided for agreements relating to standardization, specialization and R & D. The latter exempts for five years both research and joint exploitation of the research results, and restraints ancillary to these activities, subject to certain conditions; in particular, the parties must not have more than a 20 per cent market share in the relevant product. Crisis

cartels are also permitted in certain industries as long as they are aimed at achieving a coordinated reduction of overcapacity and do not restrict free decision-making by the firms involved. Cooperative ventures 12/ in general (and ancillary restraints) can be exempted if they fall within the exemption clause in article 85, taking into account the effects of the venture on competition between the parties and on third parties.

16. The Republic of Korea's competition legislation 13/ prohibits in principle collaborative activities between entrepreneurs which substantially restrict competition in any particular field of trade; these include collusive agreements on prices or other sales conditions, on production capacity or output, on customers or markets, on specialization and on joint operating agencies. However, the parties may apply to the Commission for prior approval, and exemptions may be granted if the proposed collaboration is deemed necessary in order to rationalize an industry, to overcome a cyclical recession, to facilitate industrial restructuring, to improve the competitiveness of SMEs, to promote research and development or to rationalize terms of transactions. Authorizations may not be granted if the collaboration exceeds the limit necessary for achieving the purposes thereof, if the interests of consumers and other entrepreneurs may be unreasonably injured, if there is unreasonable discrimination among the participating firms, or if participation or withdrawal from collaboration is unreasonably restricted. By 1993, 95 undue collaborative activities had been remedied, about half of them involving price-fixing. 14/ The Commission has been cautious in exercising its powers to grant exemptions; as of the end of 1993, there were only five exempted cartels in existence. 15/

C. Specific sectoral exemptions

17. In contrast with functional exemptions, sectoral exemptions are specifically directed at certain sectors, though in practice the line between the two is blurred. Primary, manufacturing and service sectors are dealt with below in that order. It is noteworthy that most sectoral exemptions concern mainly primary or service sectors; it is relatively less common for explicit sectoral exemptions to be provided for specified manufacturing sectors, although it is true that some manufacturing sectors may be wholly or partly covered by rule of reason, functional, personal or territorial exemptions.

18. Agriculture and fisheries are key sectors which are often excluded, exempted or treated favourably in many competition laws. Some exemptions are general in scope, while others apply only to particular products. Some exemptions require the approval of a governmental agency, while others are automatic. Conduct may be exempted because it is permitted or regulated in the context of laws organizing a particular market, as in the case of national market organizations. The formation and activities of producer associations and cooperatives, cartels and resale price maintenance may be exempted to a greater or lesser extent. The European Union exempts agreements which are deemed to be necessary for the achievement of the Common Agricultural Policy, as well as agreements forming an integral part of national market organizations. The United States allows cooperation between agricultural producers, including price-fixing, but the Government may order such conduct to be terminated, and anti-trust immunity does not extend to monopolization

(or attempts to monopolize) by cooperatives engaging in predatory or otherwise anti-competitive activities. Similar exemptions are provided for the fishing industry. * **In Japan, joint economic business of agricultural cooperatives and fisheries cooperatives is exempted from the Antimonopoly Act.** The Republic of Korea's competition law applies to all sectors except agriculture, fishing and mining. Under the Zambian law, 16/ the ban on allocations by quota as to sales and production does not apply to statutory arrangements relating to the production and sale of coffee.

19. On the other hand, in the implementation of the Venezuelan law, steps have been taken to introduce competition in the agricultural sector, even though special problems were faced because of market structures characterized by bilateral monopolies between concentrated processing industries and organized producer associations which traditionally fixed prices, import quotas, tariff exemptions and other policies with the Government. Taking into account the monopsonistic structures prevailing, producer associations representing no more than 15 per cent of the relevant market have been allowed to agree upon and negotiate prices in a concerted manner, and producers have been ordered to publicize prices they offer (so as to limit discrimination). 17/ Competition enforcement has also been undertaken against monopolies distributing sugar and trading in and guaranteeing minimum prices for coffee and cocoa. Similarly, in Chile, associations for the production and marketing of wheat flour and bread, and a monopsony of edible oil producers formed to purchase agricultural products, were dissolved by the competition authority. 18/

20. The grant of absolute or limited exemptions is also common in the extraction industries. In Mexico, the Government's monopoly in "strategic areas", including extraction of petroleum, other hydrocarbons and radioactive minerals, and in basic petrochemical industries, has the result of exempting these sectors from the competition law. 19/ However, the scope of this exemption is strictly construed to apply only to the specific strategic activities reserved for the Government; thus, the competition authority has recently intervened in respect of the grant of concessions for petrol stations by the State-owned oil company. In the United States, various energy sectors are overseen by regulatory agencies, which typically regulate industry rates and acquisitions, and are required to take competition concerns into account; otherwise, no anti-trust immunity is granted to these sectors. The European Union applies a special competition regime (under the European Coal and Steel Treaty) to its coal and iron and steel industries; the European Commission has the power in certain circumstances to fix production quotas and prices in these industries, while the criteria for analysing the anti-competitive effects of mergers may be less strict than the criteria applied under the Merger Control Regulation. 20/

21. In the area of manufacturing, Japan * exempts some pharmaceutical items **and cosmetics** from its prohibition on resale price maintenance (RPM); **however, these exemptions are being phased out.** Medicaments in general are excluded from the ban on RPM in the United Kingdom. Defence-related industries are wholly or partially exempted in several countries. In the Republic of Korea, apart from the possibilities for exemptions under the competition law, separate legislation provides for rationalization programmes for some

declining "sunset industries" and some growing "sunrise industries", which may only last up to three years; relatively few industries have been placed under such programmes.

22. Labour and employment-related activities (or trade unions) are exempted in most competition laws, although some laws may apply to some activities in certain circumstances. In the distribution sector, the European Commission exempts exclusive dealer networks for cars; however, reductions are being made to the restrictions permissible in this area. Exclusive purchasing agreements for petroleum-based and other fuels for resale in a designated service station are also exempted. Japan allows * **joint economic business by and among members of retail store owners' associations as to shopping centres, and cartels among wholesalers who deal in central wholesale markets for perishable food**. Many countries provide special treatment to the media and publishing industries; in some countries such as Germany, * the Republic of Korea and the United Kingdom, the prohibitions on resale price maintenance, for instance, do not apply to transactions in literary works. **Although the Japanese competition law also exempts copyright items from the prohibition on resale price maintenance, this exemption will be circumscribed in future; the Japanese Fair Trade Commission has criticized the system of pricing and sales for products protected by copyright, including compact discs and newspapers, noting that domestically produced compact discs are much more expensive than imported discs 21/ (it may be noted that in some countries such as Germany, copyright-collecting societies are exempted from the ban on cartels, on resale price maintenance and on prescription of business terms)**.

23. The financial services, insurance and securities sectors are subject to extensive government regulation for prudential reasons in virtually all countries; this has led to the adoption of sector-specific competition rules in some jurisdictions, as well as to formal exemptions from competition laws in others, and may have led in some cases to reduced enforcement activity in these sectors. In the United States, the banking industry is covered by a specialized anti-trust regime similar to that ordinarily applied, but a lenient enforcement policy with respect to mergers is applied by the banking regulatory agencies if certain conditions are met. An exemption is granted to the "business of insurance" to the extent that it is regulated and actively supervised by states of the United States, but the exemption does not extend to mergers or collective boycotts. The European Union has adopted a block exemption for certain kinds of agreements in the insurance sector. In Japan, **some kinds of damage** insurance rates are fixed by an industry cartel. In the Republic of Korea, banks have been largely exempted from competition enforcement until recently, but are now subject to expanded enforcement; the insurance sector still has a degree of exemption. The banking and insurance industries in India are excluded from the provisions of the competition law 22/ in respect of those matters in respect of which there are specific provisions in the relevant legislation governing these industries (only State-owned banks would be covered).

24. Several countries grant a degree of immunity to internal transport industries (by road, rail or water). The United States grants anti-trust immunity to ocean common carriers, liner conferences and marine terminal operators provided the agreements they enter into are notified. Ocean carriers cannot engage in predatory or discriminatory pricing, and conferences

and agreements between liner carriers must be open to new participation. Japan also exempts agreements between ship-operators on freight rates or other conditions of transportation unless unfair methods are used or there is an undue increase of charges through a substantial restriction of competition. The European Union also exempts, subject to certain conditions, several types of horizontal practices among members of liner conferences, as well as some agreements between conferences and transport users. The block exemption is granted subject to certain obligations being met to ensure that conferences operate alongside non-conference lines. In recent years, the European Commission has taken action against allocations of cargo quotas, price-fixing, capacity restrictions, non-competition agreements and exclusionary practices involving shipping conferences or liner carrier agreements between Europe and Africa, 23/ or with the Far East. Based on the approach provided by the United Nations Liner Code, many developing countries have sought in the past to guarantee 80 per cent of the liner trade to designated national lines at both ends of the trade, leaving 20 per cent to third country lines, but substantial liberalization has occurred in recent years. Germany, Japan and the United States also exempt various pricing agreements between the providers of services related to seaports. The air transport industry also has a degree of immunity from competition law in many countries, although the scope of immunity varies from country to country, and the trend in several countries has been to reduce such immunities. The European Union exempts from article 85 (1) certain agreements relating to the operation of computer reservation systems, schedules, joint operation of services, and consultations on tariffs and slot allocation.

25. Network or infrastructure industries which have a natural monopoly element are usually regulated under special regimes in most countries. Such special regimes may be more stringent than competition regimes in some respects and less stringent in others. Network industries may also concurrently be subject to the general competition law (particularly to its provisions relating to abuse review), or they may be partially or fully exempted from its ambit. The European Union and the United States apply most of their competition laws to the telecommunications sector *. In Chile, following the application of the competition law to the telecommunications sector to inter alia control vertical integration between local and long-distance telephone companies, a separate system of industry regulation has been adopted relating to the grant of concessions and conditions to be met by concessionaires. In the United Kingdom, the principal standing agreements in the electricity sector, as well as certain agreements in the gas and telecommunications industries, are exempted from the law relating to restrictive practices, but these sectors are closely regulated under special legislation. The European Union will be liberalizing the electricity market, requiring member States to allow both third-party access to distribution networks and the right of eligible consumers to import supplies and sell them to the network operator, but allowing States the possibility of having a single buyer of electricity.

26. To determine the real extent to which a sector is subject to competitive disciplines, it would be necessary to look not just at their treatment under competition law, but also at the general regulatory framework established in such sectors by Governments (including regulatory restrictions upon market entry, as well as competition-distorting subsidies). It is not a coincidence

that many sectors which have a degree of exemption from the application of RBP controls (such as agriculture) are also subjected to pervasive governmental regulation and subsidization. While there has been a universal trend towards liberalization, deregulation and market orientation, 24/ many such governmental restrictions or subsidies continue to exist. The picture is made even more complicated by the fact that partial liberalization in some sectors has been combined with partial application of competition laws (as in some network industries in some countries) and by the fact that regulatory restrictions in a sector may be a response to restrictions followed in the same sector in other countries. In Poland, for example, several sectors are subject to regulatory policies, including power engineering, water supply, telecommunications, postal service, rail transport and the sugar industry - the regulation of the sugar industry was made necessary by the practice followed in most OECD countries. 25/ Although the possibilities for the competition authority to influence the market in these sectors is therefore limited, the Antimonopoly Office still often intervenes in these sectors, both to control monopolistic practices and to encourage structural changes through the introduction of some elements of competition (such as by insisting on the grant of access to networks).

Chapter II

APPLICATION TO PERSONS AND ENTITIES

A. General application to some types of entities

27. The general principle in all competition laws is that all persons or enterprises are equally subject to the competition law, without discrimination. This general principle is usually qualified in some respects. Different types of entities may be the subject of exceptions or exemptions, or of provisions for stricter application, on account inter alia of their ownership, turnover, market share, structure, or involvement with governmental authorities. Such entities may include small- and medium-sized enterp ises (SMEs), firms holding monopoly or dominant positions, affiliated firms linked through ownership or control, professions, trade unions, cooperatives or trade associations. However, at least some of the special provisions relating to such entities may not really involve differential treatment. Provisions providing for stricter scrutiny of practices involving dominant firms, or for lenient treatment of SMEs, for example, may merely be a recognition that adverse effects upon competition are more or less likely (as the case may be) to result from practices by such firms. It may also be noted that the border line between personal and other types of exemptions is blurred; exemptions provided for employment-related activities and for trade unions would be similar in effect, for instance.

28. Some competition laws expressly provide for exemptions for SMEs. Japan exempts some types of cartels and contracts by SMEs. In Germany, subject to various conditions, agreements among SMEs for cooperation and joint purchasing and recommendations offsetting structural disadvantages suffered by SMEs with respect to large firms are permitted, SMEs may not be subjected to discrimination and, in merger control, the creation of a dominant market position is more easily presumed if over two thirds market share is held by SMEs. The European Union's block exemptions for distribution and for non-reciprocal exclusive purchase agreements apply to competing manufacturers only if one of them has a turnover of less than ECU 100 million; as under the German law, most agreements between SMEs with a combined market share of 5 per cent or less are exempted. Other competition laws, such as the Mexican law, make no distinction between SMEs and large enterprises. However, even where competition laws contain no special provisions regarding SMEs, they may receive favourable treatment de facto because they fall beneath the thresholds above which certain procedures or prohibitions are applied, or because their activities are assessed as having a de minimis effect upon competition. On the other hand, enterprises having a turnover or market share exceeding a given threshold may be subject to special scrutiny under many competition laws. As described in the previous chapter, this may merely be in relation to thresholds needing to be met before abuse of dominance or merger investigations will be triggered off, or before a presumption of dominance is established, but some provisions in a competition law may be directed solely at dominant firms, and in a few countries, competition authorities keep lists of dominant firms.

29. Although most competition laws do not make any express reference to practices among affiliated enterprises, it would usually be recognized in the evaluation of individual cases that practices between firms constituting a single economic unit should be granted more lenient treatment than similar practices between unrelated firms. Both horizontal and vertical practices between firms under common control are usually considered legitimate, and this may also be the case for practices which might otherwise be considered abuses of dominant position, depending on the closeness of the relationship between the firms concerned and on the effects on third parties. Conversely, interconnected companies would normally be treated as a single firm in assessing market share or market power, or in respect of collusion. Under United States law, it is considered that a corporation and its wholly-owned subsidiary are incapable of conspiring because they must be viewed as a single entity; however, it has been held that a company with a 50 per cent share in a joint venture committed abusive monopolization when it prevented the venture from competing with itself. 26/ In France, the test for whether intra-enterprise agreements are exempted is whether the members of the group enjoy commercial autonomy or not. A more restrictive test is applied under the EU regulations; intra-enterprise agreements are not covered if, in an individual case, the companies concerned form an economic unit in which the subsidiary has no real freedom to determine its course of action on the market and if the agreement is concerned merely with the internal allocation of tasks within the group. The Jamaican competition law expressly provides that a group of "interconnected companies" shall be treated as a single enterprise. The Zambian law, in proscribing abuses of dominant position, makes no specific reference to affiliated firms, but specifies that it applies to mergers or takeovers between two "independent" enterprises and to collusion where enterprises are not dealing with each other in the context of a common entity wherein they are under common control or otherwise unable to act independently of each other.

30. Trade associations **or their activities** are expressly covered in many competition laws (such as the Indian, Kenyan or Zambian laws), and even where they are not expressly mentioned, they would usually still be covered. However, some trade associations, or certain of their activities, may be exempted. Japan's Fair Trade Commission *** has recently issued revised** competition guidelines *** dealing with the evaluation of the illegality of trade associations' activities ***. The Republic of Korea's competition law prohibits trade associations and their members from undertaking undue concerted activities and unfair business practices, and also prohibits trade associations from limiting the number of firms which may join them, and from unreasonably restricting the business activities of their members. Cooperative associations are given some degree of immunity in several competition laws, as in the Indian law. In some countries, exemptions for trade associations or for cooperatives may be combined with exemptions for SMEs, who may be allowed to join together in such bodies to negotiate with large firms. Trade unions are usually exempted, as discussed above. The activities of some professions and professional associations are usually not formally exempted in competition laws, but other legislation regulating such professions may permit some practices, and enforcement policy in this area in several countries has traditionally been slack. Increasingly, however, the rationale for exempting professions is being questioned, and the trend is to permit only those restrictions that may be justified for valid professional

reasons. In Venezuela, for example, action has been taken in respect of price-fixing agreements among stock exchange brokers and a call for boycott action by the pharmacists' professional association. 27/

B. Application to governmental entities or persons authorized by them

31. Most competition laws do not apply to Governments when they are undertaking sovereign acts. In the United States, for example, the Federal Government and the different states are not subject to the competition law. On the other hand, the Russian competition law, for instance, prohibits organs of power and administration from adopting legislation or taking actions which limit the independence of economic subjects, or discriminate among economic subjects, if they would result in a significant limitation of competition or encroachment upon the interests of other economic subjects or citizens. Acts which are prohibited include, for example, limitations on the creation of new economic entities in any sphere, as well as prohibitions on the conduct of particular kinds of activity or the production of particular kinds of goods (unless envisioned by legislation) and territorial restrictions on buying and selling goods within the Federation. The formation of governmental bodies with the goal of monopolizing production or sale of goods is prohibited, as are anti-competitive acts among governmental bodies or between such bodies and economic subjects. Under the Chinese law, 28/ local governments and their subordinate departments (but not the central Government) are prohibited from abusing their administrative powers to force other persons to buy the goods of designated operators, to restrict the lawful business activities of other operators, or to restrict the entry of goods from other parts of the country into the local market or the flow of local goods to markets in other parts of the country. The European Union competition rules (which are of a supranational character) control the grant by national Governments of State aids distorting competition and affecting trade among member States by favouring certain undertakings or the production of certain goods, as well as the grant of exclusive rights to providers of public services, unless these are services of general economic interest. 29/ In Poland, the Antimonopoly Office has started to work out a system for the control and monitoring of public aid. In some countries such as Japan or Mexico, a distinction is made between the sovereign acts of Governments, which are excluded from the purview of competition laws, and their acts when they are operating as economic agents or are undertaking private law activities, which would be covered.

32. Some competition laws 30/ exclude public enterprises (PEs) from their application, but most competition laws 31/ apply the same rules to them as to privately-owned firms, although there may be differences in some countries as to whether particular activities of PEs fall within the purview of competition laws. In Mexico, PEs are covered by the competition law when they engage in non-strategic activities not expressly mentioned in the Constitution as constituting a responsibility of the State. In the Republic of Korea, the Fair Trade Commission undertakes annual investigations of major PEs, publicly notes any unfair trade practices committed and enacts guidelines for prior prevention and inspection. The Chinese law specifically prohibits practices by public utilities or other monopolies to force some enterprises to buy goods of designated enterprises so as to exclude other enterprises from competing fairly. Even in countries where PEs do not come within the scope of the law,

they may be required as a matter of policy to abide by its provisions, as in the United Kingdom. Under the Treaty of Rome (art. 90), public undertakings and undertakings to which member States have granted special and exclusive rights are subject to competition rules, unless the application of these rules would obstruct their performance of special tasks in the general economic interest, and provided that the development of trade is not affected to an extent contrary to the interests of the Union. The European Commission has issued directives or individual decisions to member States in the application of this article in respect of such areas as telecommunications, postal services, energy and air transport.

33. In many countries, competition authorities have the mandate to advocate competition policy concerns in the elaboration of other policies or legislation. They may also make representations to different regulatory authorities, which may include inter alia authorities responsible for regulation of network industries, transport industries, public procurement, privatization or international trade. However, such representations may not always be taken into account, particularly in the area of international trade. In some countries, mainly some developing and Eastern European countries, the advocacy and consultation powers of the competition authorities may be quite extensive. In the Republic of Korea, for instance, the central administrative authorities are required to consult with the Fair Trade Commission before they enact, amend, or issue any legislation or administrative measure that is likely to restrain competition, i.e. that gives rise to undue collaborative activities or restricts the number of firms in a given sector. During the 1981-1993 period, out of 897 cases of such consultations, there were 196 rectifications. 32/ In Hungary, while the scope of the competition law 33/ does not extend to governmental authorities, the Office of Economic Competition may request the courts to review administrative rulings violating freedom of competition, and ministers must solicit the authority's opinion on proposed laws which would restrain competition, particularly those relating to market activities or access, providing exclusive rights or regulating prices or marketing. The President of the Office is consulted in governmental discussions affecting the Office's competence, and may request the Constitutional Court to repeal rules infringing both the Constitution and freedom of competition. However, the Office has no legal authority to prevent or request modifications in connection with privatization of firms in monopolistic or dominant positions.

34. The immunity of foreign Governments or PEs from competition law would depend on the general law of the country concerned. Acts of private persons may also be exempted where they have been authorized by national Governments. In India, agreements expressly authorized by or under any law, or having the approval of the Central Government, or to which the Government is a party, are not liable to registration on the Restrictive Trade Practices Register. In Kenya, practices which are directly and necessarily associated with the exercise of exclusive or preferential trading privileges conferred by the Government are exempted from the scope of the law. Even where there are no such express provisions, it is likely that many competition laws would not be enforced in such circumstances. However, competition laws may sometimes still be applied in respect of abuses of dominant position or other competition infringements; this is the case in Hungary, for instance. In France, the conclusion of an agreement compelled by law or by Government regulation does

not fall within the scope of the law, but legislation which merely reduces the scope for competition or mere governmental encouragement does not preclude the application of the law, including control of abuses of dominant positions created through legislation. In Venezuela, entities deriving dominant positions from the law are subject to the provisions of the competition law unless specific conditions stipulated by the appropriate regulatory authority dictate otherwise.

35. In the United States, the governmental activities of a foreign sovereign are also immunized, but commercial activities would not be. A claim brought against the OPEC countries in respect of a rise in oil prices was dismissed on the ground of sovereign immunity, for example; it was held that the establishment by a State of the terms for the removal of a natural resource stemmed from the nature of sovereignty and was a governmental activity, while foreign nations were not "persons" within the meaning of the anti-trust laws. 34/ The situation would be the same for a foreign PE. Under the Act of State doctrine, the courts may also decline to rule on the legality of official acts of foreign Governments acting within their own jurisdiction. As regards acts of private persons, they are exempted from the scope of the competition law, under the state action doctrine, if they are compelled by a state, or if they are undertaken pursuant to a clearly articulated state policy designed to displace competition and the state actively supervises the conduct in question. An implied anti-trust immunity can also result from the procedures for settling disputes under trade laws (which can involve price and quantity agreements by the foreign firms involved), **where such actions taken by the foreign firms are in conformity with the governmental action in entering formal suspension agreements on the record; however**, * the Antitrust Enforcement Guidelines for International Operations emphasize that agreements among competitors that do not comply with the law, or go beyond the measures authorized by law, would not be immunized, irrespective of involvement of, or encouragement by, United States or foreign government officials. Under the Noerr-Pennington doctrine, a genuine effort by private parties to obtain or influence action by governmental entities is immune from anti-trust liability even if the intent or effect of that effort is anti-competitive. Immunity does not extend to litigation which is objectively baseless and intended to interfere directly with a competitor's business relationships by using the governmental process (rather than the outcome of the process) as an anti-competitive weapon, but this does not apply to administrative proceedings, such as proceedings before trade tribunals. It is unclear to what extent petitioning by a private person of a foreign sovereign would be immunized, but the Antitrust Enforcement Guidelines indicate that the federal enforcement agencies would not bring proceedings in such cases. A firm acting under the compulsion of a foreign State would also be immunized, but not if it was merely permitted or assisted by the foreign State.

36. Under European Union competition law, the rules applicable in this area are not clear, but it may be noted that, in a case involving alleged dumping by Eastern European producers which were organs of their respective States, 35/ sovereign immunity arguments were rejected. The action taken in the French/West African Shipowners' Committees and CEWAL Liner Conferences 36/ would also indicate that where private persons petition foreign sovereigns to implement policies restricting competition by granting them exclusive rights, such private persons would not be immunized from the

application of European Union competition law in respect of the petitioning and the subsequent anti-competitive activity. **However, where cartel practices between EU firms are undertaken after consultation with the EU Commission and are designed essentially to make measures taken by the Commission more effective and easier to supervise, they will be exempted; this was done in respect of steel quotas, for instance.** 37/

37. Several competition laws explicitly exclude from their scope activities expressly approved or required under a treaty or agreement to which the country concerned is a party 38/ (it may be recalled in this connection that article B.9 of the Set of Principles and Rules excludes from its scope intergovernmental agreements and RBPs directly caused by such agreements). Such a provision would be relevant, for example, to trade-restricting agreements that may be entered into by Governments, as well as some commodity agreements. Even without such an explicit provision in the competition law, it is unlikely that a competition authority would enforce RBP controls in such circumstances. *

Chapter III

EXEMPTIONS RELATING TO INTELLECTUAL PROPERTY RIGHTS

38. All competition policies expressly or implicitly exempt from their application the exclusive rights inherent in intellectual property protection granted by the State, which are considered to justify restrictions that would otherwise be subject to controls. Under the doctrine of per se legality applied in some countries, the grant of an intellectual property right (IPR) implies the right to impose restrictions upon licensees which are within the scope of the protected rights, or are closely related to them. In Jamaica, for instance, exemptions are granted to persons or businesses with rights under or existing by virtue of any copyright, patent or trademark and any arrangements that the Fair Trade Commission has authorized. 39/ While patented goods sold by dealers cannot be subject to resale price maintenance, the price of goods produced by a patent licensee or assignee may be laid down by the patent-holder. Under some competition laws, "white lists" of practices which will not be challenged under competition law have been established through legislation, administrative guidelines or enforcement practice. Typically, such exempted practices may include inter alia: prohibitions upon sub-licensing, field-of-use restrictions pertaining to type of use, technical field, or product markets; restrictions relating to volume, territories, or possible customers; reciprocal grant-backs; time restrictions (within the lifetime of the IPR); restrictions on the use after termination of the agreement of IPRs maintaining their validity and of know-how not having lost its secret character; and non-disclosure obligations (in the case of know-how).

39. However, uncertainties regarding the competition law treatment of some IPRs, or enforcement policy in this area, may be arising from the lack of explicit provisions dealing with them in some competition laws or guidelines. Thus, the United States Antitrust Guidelines for the Licensing of Intellectual Property deal only with technology transfer and innovation-related issues arising with respect to patents, copyright, trade secrets and know-how agreements, and not with product-differentiation issues arising with respect to trademarks; however, the Guidelines clarify that the same general anti-trust principles would apply to trademarks. The Japanese Guidelines 40/ apply only to licensing of patents, utility models and know-how; **however, the Antimonopoly Act Guidelines also exempt from their application acts recognizable as the exercise of rights under the Copyright Act**. Although the Japanese competition law exempts copyright items, this exemption will be reviewed in future; the Japanese Fair Trade Commission has criticized the system of pricing and sales for products protected by copyright, including compact discs and newspapers, noting that domestically produced compact discs are much more expensive than imported discs 41/ (it may be noted that in some countries such as Germany, copyright collecting societies are exempted from the ban on cartels, on resale price maintenance and on prescription of business terms).

40. Under most competition laws, the exemptions granted to practices in the context of IPRs is not absolute. Corresponding to the "white lists" mentioned above, there are also, under some laws, "black lists" of practices prohibited per se, such as: practices which are not covered by the rights conferred by

IPRs at all, such as the transfer of minor or worthless IPRs only as a pretext for imposing restrictions on products or markets not covered by the IPR; cross-licensing or patent pooling between actual or potential competitors (although the application of competition law to such practices in the United States would depend upon whether the agreement restrains competition between the parties, hinders possible competition from third parties, or confers monopoly power giving rise to substantial anti-trust risk); unilateral or exclusive grant-backs; restrictions after expiry of the agreement on the use of know-how which is no longer secret; and, in some countries, some vertical restraints such as vertical price-fixing. The Japanese Guidelines **prohibit** * price-fixing of sale and resale prices of protected goods within Japan * **; however, a licensor is** permitted **to fix export prices or to limit or prohibit exports** * if the licensor has a protected right in the foreign country, if it has been continuously marketing the item in that market, or if it has assigned exclusive rights to a third party.

41. Under many laws, even though no formal "black list" has been established, the types of practices permitted would be limited by the general principle that an IPR only gives rise to an exemption in respect of restrictions falling within its scope. Under the German competition law, for example, agreements concerning the acquisition or use of patent, utility models or protected seed varieties (as well as know-how or trade secret licences as appropriate) are ineffective in so far as they impose restrictions on business conduct going beyond the scope of the IPR. However, it is expressly provided that restrictions pertaining to the type, extent, quantity, territory or period of exercise of the IPR shall not be deemed to go beyond its scope. Several other types of restraints are acceptable as long as they do not exceed the duration of the agreement; these include <u>inter alia</u> price restraints on the protected object, non-exclusive grant-backs, and restrictions on competition outside Germany. The competition authority may also approve an agreement that does not unduly limit the freedom of the licensee or of any other enterprise, or materially restrain competition in the market by the volume of its limitations. Moreover, in the application of the "inherency doctrine", the exemption embodied in this provision has been extended from the "primary" rights granted by the patent laws to rights inferred by means of economic analysis from the "primary" rights.

42. It is in fact in the application of economic analysis to the large range of practices falling between the two extremes of clear <u>per se</u> legality and clear <u>per se</u> illegality (so-called "grey lists") that most difficulties and controversies have arisen. It is generally accepted that the mere fact of holding an IPR does not in itself signify that the right-holder has a monopoly, since there may be substantially equivalent products. But it has proved difficult to identify whether contractual restrictions not corresponding to the rights directly conferred by the IPR are accessory to the rights or are abusive, enabling the right-holder to restrain competition in a manner not possible if it had directly exploited the IPR. Such difficulties have been even greater in respect of restrictions in licensing agreements for know-how or trade secrets, since they are not usually granted exclusive rights by the State, <u>42</u>/ so that their protection can only be undertaken through contractual means (although uncertainties in this area have been reduced by the issuing of guidelines under some competition laws). Moreover, some countries have been relatively more reluctant to allow restraints in licensing

agreements because of concerns about fairness and safeguarding licensees' freedom of action, as well as adverse effects on technology transfer and on incentives for licensees to innovate. Difficulties have arisen in particular in those areas where the precise scope of the rights granted by an IPR is not clear, or where there are differences in the solutions adopted by countries or by courts within one country. One such area is copyright and trade secret protection for new technologies, such as certain aspects of computer programmes; competition issues have arisen in this connection, particularly where dominant firms enjoy copyright protection over aspects of programmes which have become industry standards. It is likely that similar problems will arise relating to the scope of copyright protection of databases and information networks, as well as of patent protection of computer programmes and of biotechnology.

43. There are also differences in respect of the scope of exclusivity of the rights of production, sale, importation and distribution granted by patents. Under the doctrine of "first sale" in the United States and "exhaustion of rights" in the laws of some European countries, after the first sale of a branded or patented product by a right-holder, purchasers are entitled to dispose freely of the product. However, there are important differences in this respect. In several civil law countries (particularly in Germany), in order to ensure the free movement of goods, exclusive distribution rights attached to IPRs were considered automatically expended after first distribution effected by or with the consent of the right-holder within the country or abroad; if the right-holder imposed restrictive conditions in the sale or licensing contract, their validity would depend solely on the general competition law, and sub-licensees would not be bound. This principle has recently been amended to some extent in European Union countries; while international exhaustion of IPRs continues to apply to goods placed on the market in European Union countries, IPR owners are otherwise able to block parallel imports from other countries. Under European Union law, the existence of IPRs is protected, but their exercise to prevent parallel importation from other member States of genuine goods which have been put on the market by the right-holder or with his consent (including through affiliates or unrelated licensees) is contrary to the provisions of the Treaty of Rome relating to free movement of goods, as well as the principle of exhaustion of rights. In Japan, the principle of "international exhaustion of rights" is fully applied; in a recent case involving parallel patents in Germany and Japan, it was held that since the German patent-holder had legally transferred title to a legitimate purchaser of the patented product in Germany, it could not prevent parallel importation into Japan and subsequent sale. 43/

44. In most common law countries, on the other hand, a sale or licence by the right-holder within a country will only free the article from its rights in the absence of any restrictive conditions in the agreement (which conditions would be subject to competition controls). Further sales or licences will be subject to the same conditions even if the subsequent contracts do not expressly include them since, under the "implied licence" theory, a sub-licensee cannot acquire any better right than that already possessed by the licensee. Thus, in one case, a Kenyan court ruled that a local distributor could not import a pharmaceutical product into Kenya due to territorial restrictions imposed by a United Kingdom patent-holder on a

United States licensee from which the distributor had bought the product. 44/ However, under United States competition law, competition rules may be enforced against such restrictions in licences if they affect export trade. In the Pilkington case, for instance, enforcement action was undertaken by the United States Justice Department against restrictions imposed in licences of float glass technology by a British glass manufacturing company to American licensees, restricting geographical and technological field of use, as well as sub-licences of the technology, and requiring grant-backs of improvements, which allegedly limited both imports of glass into the United States and glass exports from the United States 45/ (the United Kingdom Government has expressed the view that it is not clear that the action taken in this case could be judged to have a pro-competitive effect from the point of view of domestic markets outside the United States or that the arrangements which Pilkington agreed with its sub-licences considerably restrained competition in those markets). 46/ In respect of importation into the United States itself, imports of foreign goods made under a licence from a United States trademark owner are banned; however, parallel importation of branded goods when the foreign and domestic trademark owners are the same, or are affiliated companies, is legal, as they are under "common control". 47/ In the case of patented goods, the principle of exhaustion only applies in respect of first sale within the United States, but not where the patented product has been obtained from abroad, even where there is a parallel patent abroad for the product.

45. Under United States law, a patent holder can designate territories in which its licensee can sell a patented product even though this would not be permitted in the case of unpatented products, and exclusive territories can be carved out for several licensees. Price-fixing between competitors in the context of a patent licence for the price-fixed product is valid in principle, but there are several important exceptions to this rule. Horizontal restrictions on field of use are valid provided they are imposed on a single licensee, although exclusive field-of-use licences to several licensees may raise problems, as may field-of-use restrictions by a licensor on products manufactured by a patented machine or process. The Antitrust Guidelines for the Licensing of Intellectual Property accept that there is no presumption that an IP owner has market power, and that any market power it has does not oblige it to license the IP. However, the illegal acquisition or maintenance of market power, or unreasonable conduct in connection with the IP, would be considered anti-competitive. The existence of a horizontal relationship (such as where the parties would be actual or potential competitors but for the licence) is not inherently suspect, but it opens up more possibilities for challenge by the authorities. To determine whether a restraint should be given per se or rule of reason treatment, it will be assessed whether it can be expected to contribute to an efficiency-enhancing integration of economic activity, facilitating the combination of the IP with complementary factors of production. The rule of reason analysis applied to IP will be the same general analysis applied to other forms of property, although the specific factors involved, such as the ease of appropriation of IP, or the importance of technology or innovation markets in this area, will be taken into account. Thus, although the principles applicable to licensors' grants of exclusivity to and among licensees will be similar to those applicable to comparable vertical restraints not involving licensing, ease of appropriation of IP will justify some restraints which would otherwise be forbidden. A safety zone

has been defined within which the Department will not usually challenge a licence's restraints as long as they are not "facially anti-competitive", 48/ provided the parties' combined market shares of each market significantly affected are no more than 20 per cent.

46. Under European Union law, exclusivity clauses in licensing arrangements are subject to economic analysis; factors which may lead to their being accepted include whether they are "open" (not affecting the position of third parties such as parallel importers and licensees for other territories), if they are for new technology, if they are necessary to provide the licensor with a fair reward or to encourage inter-brand competition, other general characteristics of the industry and the technology, and a duration which is not too long. 49/ The acquisition by a market-dominating enterprise of an exclusive patent licence for a process which is exceptionally efficient and crucial for production is considered to be an abuse if the enterprise thereby aims to extend its existing technological supremacy and to block competitors' access to the only equivalent competing technology, unless the risks taken by the enterprise in further developing the licensed technology require exclusivity. 50/ The European Union **has recently adopted** * guidelines relating to the licensing of patents,* know-how and * **combined licences, containing lists of different types of practices which are exempted (mainly sole and exclusive licences and associated export bans), which are acceptable if not subject to an opposition procedure by the European Commission, or which are banned outright; the benefits of the block exemption may be withdrawn in certain circumstances, such as lack of effective inter-brand competition particularly where the licensee's market share exceeds 40 per cent** * 51/. In general, dominance is not considered to arise simply from the possession of an IPR, and abuse of dominance will not be considered to have occurred where a practice is inherent to the "specific subject-matter" and "essential function" of the IPR. The mere refusal to license an IPR, for example, is usually not in itself an abuse, nor is preventing competitors from manufacturing, selling or importing products incorporating the IPR without consent. However, arbitrary refusal to supply or to continue production of spare parts, or unfair pricing of such parts, would constitute abuse 52/ (a controversy is now occurring in the Union relating to the appropriate scope and duration of industrial design protection for car spare parts). In exceptional circumstances, a refusal to license may amount to an abuse where product innovation is prevented, all competition is excluded in downstream markets and the right-holder's refusal is not justified by its activities. 53/ Clauses in licensing agreements restraining exports to non-European Union countries are permitted as long as trade within the Common Market is not affected. On the whole, compared with United States law, European Union competition rules appear to apply more stringent competition controls over the exercise of IPRs within the Common Market. However, the similarities between the two laws are more important, as demonstrated by the joint enforcement undertaken against a dominant computer software firm in respect of its use of price-related licensing practices and trade secret or confidentiality agreements to inhibit competition. 54/

47. The competition laws of developing countries and countries in transition usually provide for some degree of exemption for IPRs, but the enforcement practice necessary to clarify the scope of such exemptions has been very limited. The Venezuelan law does not contain any specific mention of IPRs,

but guidelines clarify that the imposition or establishment of limitations on the acquisition or utilization of IPRs, including technical expertise, may be given prior authorization by the competition authority. Under the Indian law, no order may be made with respect to any monopolistic or restrictive trade practice to restrict the right of any person to restrain any infringement of a patent, or to attach conditions to a patent licence in respect of acts which, but for the licence, would be an infringement of the patent; the patent must have been granted in India. The prohibition by the Indian competition law of resale price maintenance applies to articles covered by a patent or a trademark. The Polish competition law 55/ states that it does not prejudice IPRs, but that it applies to licensing contracts and other actions concerning their exercise. Separate guidelines have been issued covering licences, 56/ which follow the general approach of the corresponding European Union regulations. Clauses in licensing contracts are divided into those which are permitted and those that might be subject to control under the competition law; examples of clauses which may be proscribed include no-compete clauses, territorial exclusivity clauses and restrictions on export prices or volumes. The Republic of Korea's competition law exempts activities recognized as an exercise of rights granted under its IP laws; however, as noted above, there is a public notice relating to potentially unfair practices in international contracts, including IP and technology licences.

Chapter IV

GEOGRAPHICAL SCOPE OF APPLICATION

48. All competition laws are applicable on national territory, in accordance with the principle of territoriality. Some competition laws are also applied outside national frontiers, but there are significant differences in the legal doctrines and practices on the basis of which this is done. "Objective" territorial jurisdiction is asserted by some countries, under certain conditions, in respect of acts formed abroad and implemented within national territory, irrespective of whether or not there is recourse to local subsidiaries to make contacts with purchasers on national territory. In the famous Wood Pulp case, 57/ the European Court of Justice asserted jurisdiction over foreign members of an overseas cartel selling within the EU market on the basis of objective territoriality; however, this decision has now been overruled on other grounds. But the EU Merger Regulation applies to mergers of non-EU companies on the basis of a minimum turnover in the EU, irrespective of whether there is physical presence therein, and overseas mergers among large foreign companies are often screened by the EU Commission.

49. Under the "effects doctrine", United States competition laws apply subject-matter jurisdiction over "foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States". 58/ This includes: foreign conduct involving import trade; foreign conduct, or overseas mergers, 59/ having a "direct, substantial and reasonably foreseeable" effect on United States imports or trade; cases where export trade is restrained; and cases where RBPs affect the finance or purchase by the United States Government of goods or services abroad. **In one case, for instance, the acquisition by a British telecommunications company of a partial shareholding in a United States communications firm, combined with the formation of a joint venture for global telecommunications services, was initially blocked by the Justice Department on the grounds that the venture would give British companies an unfair advantage over United States companies in ease of access to the United Kingdom telecommunications network, and raise the price of international telecommunications services; the transaction was eventually permitted when the parties agreed to publish rates, terms and conditions of access to the United Kingdom network, and to accept provisions designed to prevent discrimination against United States carriers in offering international services. 60/ The exercise of extraterritorial jurisdiction by the United States in the application of the effects doctrine is contested by the United Kingdom, which is also concerned about the use by countries of their competition policies to promote their trade interests. 61/** However, "comity" considerations will lead to an abstention of exercise of jurisdiction where there is a "true conflict" between United States and foreign law, so that compliance with United States law would constitute a violation of the other country's law (mere encouragement or acquiescence in anti-competitive conduct by a foreign Government will not suffice). Jurisdiction will also not be exercised overseas if the legal defences of foreign sovereign immunity, act of State, and foreign sovereign compulsion (of conduct entirely within foreign territory) are available, while the United States federal competition agencies will take into account cooperation agreements or understandings with foreign competition agencies in deciding whether to bring proceedings.

50. It may also be noted that section 301 of the United States Trade Act of 1974 provides that trade action can be taken against any goods from a country that injures United States trading interests by tolerance of systematic anti-competitive activities by firms in that country which restrict access of United States goods or services to purchasing by such firms. **One complaint made under this provision to the United States Trade Representative, which alleged that the Indonesian Government targeted exports of wood products, encouraged vertical integration of logging and processing activities, and did not promote competition in the logging industry or protect consumers' interests, was dismissed; another complaint that market access to the Japanese amorphous metals market was denied through a combination of targeting and of toleration of RBPs was eventually withdrawn after agreement was reached relating inter alia to the purchasing by Japanese firms of metals produced in the United States, or from a licensee of the complainant American firm. 62/ Other provisions of the Trade Act may also be relevant to competition issues; an investigation under the public procurement provisions of this Act held that * the * procurement policies implemented by the Japanese** Government in the construction sector * limited competition and facilitated collusive bidding *. An interesting linkage between competition, trade and investment policies has also been made in the United States; as noted in chapter II, production joint ventures which are found to be anti-competitive are exempted from treble damages only if the principal production facilities of the venture are located in the United States.

51. In Germany, the effects principle is also applied in competition cases, but its application is qualified by the public or private international law principles of reasonable forum contacts and non-interference. Thus, in cases of overseas mergers, German competition law will not be applied if the effect of the merger on the German market is relatively insignificant compared to the effects overseas; intervention will in any event be undertaken against only that part of the merger having "concrete" domestic effects (i.e. the merger of the local subsidiaries). 63/ However, pre-notification for overseas mergers is necessary if they produce perceptible and direct domestic effects on the German market (even if the firms concerned have no local subsidiaries). 64/ Recently adopted or revised competition laws of EU countries all proscribe agreements, including agreements formed overseas, that have as their object or effect the distortion of competition or the abuse of a dominant position on national markets; this has been applied by the French courts, for example. 65/ Australia, Brazil, Canada, Chile, 66/ the Czech Republic, Peru, Poland and the Slovak Republic have also adopted the effects principle in their laws. The Republic of Korea's competition controls upon unfair practices in international contracts apply wherever these restrictions are exercised. 67/ On the other hand, in the United Kingdom, enforcement is undertaken only against persons carrying on business within the United Kingdom; discretion as to such enforcement is exercised in the light of the United Kingdom Government's views as to the extent of States' jurisdiction under international law. Under the Indian law, where any party to an RBP does not carry on business in India, an order may be made with respect to that part of the practice which is carried on in India. In general, however, the laws of most developing countries are silent on the question of their applicability overseas, and there is little experience in this area so far.

52. Although the objective territoriality and effects principles for exercising overseas jurisdiction are likely to lead to similar results in many cases, certain conduct overseas such as import cartels or concerted refusals to buy from foreign exporters or supply foreign importers might well fall outside the scope of objective territorial jurisdiction but be caught under "effects" jurisdiction. Differences among competition laws relating to their applicability or their enforcement overseas may also arise in respect of the scope of personal jurisdiction claimed. The concept of "enterprise unity" is used in several countries to establish jurisdiction over foreign-based parent companies of TNCs where they exercise the requisite degree of control over local affiliates. Under United States law, anti-trust suits may be brought in the United States against a foreign corporation transacting business in any judicial district through an agent or through an affiliated corporation that is its "alter ego", provided there are minimum contacts with the United States such that due process requirements are satisfied; 68/ in addition, jurisdiction may also be asserted overseas over actions overseas by foreign subsidiaries of United States companies (considered to be nationals for this purpose). Other differences in competition laws may arise in respect of: the strength or nature of the effects upon national markets necessary for jurisdiction to be asserted; the proscription of RBPs undertaken overseas which have effects upon export trade; the nature and scope of legal principles or enforcement policies which would take foreign interests into account in extraterritorial application of the law; the willingness to intervene when effective relief depends upon action outside national territory; the frequency with which private actions are initiated; evidence-gathering practices; and the availability of treble damages. Increasing recourse by firms to new telecommunications technologies to commit RBPs across borders should increase the complexities of, and the disparities among, the legal solutions adopted in this area.

53. Whatever the theoretical jurisdiction of competition laws, it would often be difficult in practice to enforce them overseas or even to enforce them on national territory where evidence needs to be obtained from overseas. Such difficulties would particularly be experienced by developing countries and countries in transition, given their limited resource capabilities, their lack of experience in this area, and the relatively lesser likelihood that overseas-based firms will have assets within reach against which enforcement can be exercised. Even though developing countries and countries in transition may have legal provisions in this area similar to those contained in the laws of some developed countries, therefore, there is an important de facto limitation to the actual scope of application of their laws - yet they may be faced with assertions of competition jurisdiction over their territory by other countries. It may be noted in this connection that, despite the provisions of article E.4. of the Set of Principles and Rules, 69/ no competition law is applied to control RBPs undertaken on national territory which have effects solely on foreign markets. Explicit statutory exemptions from the application of competition law are provided to export joint ventures or cartels in several countries, although "spillover" effects of export cartels upon competition in domestic markets would be subject to scrutiny. In some countries, the exemption only applies if formal notification or registration of the export agreement is made to the competition authorities. Confidentiality is usually maintained regarding such

agreements even if they have been notified or registered. However, Australia and New Zealand have removed exemptions for export cartels affecting their bilateral trade. The European Union competition laws would also apply to any export cartel based in member countries having effects upon other member countries.

54. Although competition laws normally apply to import cartels or other RBPs aimed at imports, account can be taken in some countries of conduct occurring overseas in deciding whether or not to take action against such RBPs. Under German law, import cartels may be authorized if the importers are faced with market-dominating foreign suppliers and if domestic competition is not substantially restrained. In other countries, exemptions have been granted to joint buying pools to countervail the power of foreign suppliers of sulphuric acid imports into the United Kingdom, sulphur into Australia, or films into Sweden. However, competition proceedings can be taken against such buying pools in some exporting countries; United States competition law has been enforced against import cartels set up overseas to countervail the market power of Webb-Pomerene associations. 70/

55. However, there are several bilateral agreements (mainly among developed countries) or OECD recommendations providing for different forms of cooperation in this area which would serve to facilitate enforcement or to reduce conflicts in cases having effects in more than one country. The United States has thus concluded agreements with Australia, 71/ Canada, 72/ Germany 73/ and the European Commission, 74/ while Australia has also concluded a cooperation agreement with New Zealand and Germany another agreement with France. 75/ The Czech Republic, Hungary, the Slovak Republic and Poland have also agreed, in their trade and cooperation agreements with the European Union, to adopt and apply competition enforcement policy and procedures similar to those applied by the European Commission, and to cooperate on this basis. 76/ **There are similar provisions in the free trade agreement concluded by the European Union with Switzerland, in the Europe Economic Area Agreement with Iceland, Norway and Liechtenstein, and in the Euro-Mediterranean Agreements which have been concluded with Israel 77/ and with Tunisia (Euro-Mediterranean Agreements with other countries are currently being negotiated). The NAFTA Agreement contains similar but less far-reaching measures. 78/** With variations (depending upon the individual agreement), these agreements include such provisions as: notifications of enforcement activities; commitments to take into account the other party's significant interests when investigating RBPs or applying remedies against such RBPs ("negative comity"); consultations to resolve conflicts between respective laws, policies and national interests; voluntary procedures for exchange of non-confidential information exchange regarding RBPs having a substantial effect on the trade of the other party; administrative and judicial assistance to investigation or enforcement by another party; and coordinated action in respect of RBPs in both countries which are related or affect each other. Particularly noteworthy are the "positive comity" procedures contained in the cooperation agreements between the European Union and the United States **and between Canada and the United States**, under which one party may request the other to undertake enforcement against RBPs in the other party's territory adversely affecting the first party's important interests, and the other party may take such

enforcement **action** if considered appropriate. It may also be noted in this connection that the United States International Antitrust Enforcement Assistance Act of 1994 provides the federal enforcement agencies with the authority to enter into mutual assistance agreements with foreign anti-trust agencies or Governments, under which each party may in appropriate cases assist the other party in collecting information and share confidential information. The OECD has recently adopted a new recommendation (replacing an earlier recommendation) setting forth principles for cooperation in this area, including the coordination of investigations, information-sharing, positive comity and mutual assistance in investigations. 79/

Chapter V

COMPETITION POLICY AND THE URUGUAY ROUND AGREEMENTS

A. Overview

56. As appears from the previous chapters, despite the substantial differences among competition laws and policies, there are now sufficient broad similarities in their objectives, content and application ("common ground") to form the necessary substantive basis for strengthened cooperation. A strong impetus towards the further strengthening of convergence and of international consultations and cooperation in this area has been provided by the Uruguay Round Agreements. In a broad sense, all the provisions of the Agreements have a bearing upon competition policy, since the international framework governing trade obviously determines the extent of competition upon national markets. Some major features of the Agreements include: (i) tariff reductions; (ii) some tightening up of existing disciplines on trade measures; (iii) new multilateral rules to cover agriculture, trade-related intellectual property rights (TRIPS), trade-related investment measures (TRIMS) and services; and (iv) the interlinkage of all these agreements within the institutional framework of the newly established World Trade Organization (WTO), subjected to a strengthened dispute settlement mechanism. Moreover, in some areas, the Uruguay Round Agreements provide for further negotiations. Some provisions in the Agreements which specifically relate to control of RBPs by firms, and consideration of competition factors in the implementation of trade measures by Governments, are reviewed below and their substantive and institutional implications are discussed. **Provisions in those Agreements which so far have a limited membership, such as the Agreement on Government Procurement, are not covered here. Nor is there any discussion here about whether the provisions of the GATT 1994 Agreement relating to nullification or impairment of benefits are relevant to non-enforcement against RBPs allegedly restricting market access (a case between the United States and Japan over alleged market access difficulties in the Japanese photographic film market for such reasons is currently pending before a WTO dispute settlement panel). *** Those provisions **dealt with** are an important example of the general recognition in the Agreements that, in a globalized world economy, market access is affected not only by trade policies at the border, but also by economic policies primarily concerned with the domestic market. As regards competition policy in particular, it was inevitable that its links with trade rules be strengthened, given the similarity of its basic objectives with those of trade liberalization: the enhancement of consumer welfare and economic efficiency.

B. Trade in goods - State enterprises and enterprises with exclusive rights

57. Article XVII of the General Agreement on Tariffs and Trade 1994 (GATT 1994, which incorporates the General Agreement on Tariffs and Trade (GATT 1947)) contains an undertaking (already existing prior to the Uruguay Round) by each contracting party that State enterprises or private enterprises granted exclusive or special privileges (including marketing boards) shall, in their purchases or sales involving imports and exports,

act in conformity with the trade principle of non-discrimination, affording enterprises of other contracting parties adequate opportunity to compete for participation in such purchases or sales, unless the goods are for governmental use. Under the newly adopted Understanding on the Interpretation of Article XVIII of the General Agreement on Tariffs and Trade 1994, it is clarified inter alia that the article applies to exclusive or special rights, including statutory or constitutional powers, in the exercise of which the level or direction of imports or exports is influenced through purchases or sales, but it does not apply to purchases by the enterprise concerned for its own use. A main objective of the Understanding is to increase transparency and to encourage notifications relating to such enterprises to the Council for Trade in Goods.

C. Anti-dumping and subsidies

58. The Agreement on Implementation of Article VI (the anti-dumping agreement) provides that (art. 3), in determining material injury to a domestic industry, injuries caused by other factors must not be attributed to the dumped imports; factors which are relevant in this respect include trade restrictive practices of and competition between the foreign and domestic producers. The anti-dumping agreement also tightens somewhat the conditions to be followed in settling proceedings through undertakings by the exporting firm to revise its prices or to cease exports at dumped prices (art. 8). The Agreement on Subsidies and Countervailing Measures provides that injury to domestic industry from "actionable" subsidies, 80/ and the imposition of countervailing duties are to follow the same criteria and procedures as those under the anti-dumping agreement (including the determination of material injury).

D. Safeguards

59. The Agreement on Safeguards (which recognizes in its preamble the need to enhance rather than limit competition in international markets) prohibits and phases out voluntary export restraints, orderly marketing arrangements or any other similar measures on the export or import side by Governments, whether taken unilaterally or as a result of agreements or understandings (art. 11). Examples of measures similar to such "grey-area measures" include export moderation, export price or import price monitoring schemes, export or import surveillance, compulsory import cartels and discretionary export or import licensing schemes. It is provided that Members shall not encourage or support the adoption or maintenance by public and private enterprises of equivalent non-governmental measures. A procedure for compulsory notification and consultations is created regarding, inter alia, the decision to apply or extend a safeguard measure; however, notification regarding non-governmental measures is optional. These obligations under the Agreement do not apply in respect of specific measures taken under other Uruguay Round Agreements, such as measures taken in relation to the textiles, agriculture, or services sectors.

E. Licensing of IPRs and parallel imports

60. The TRIPS Agreement recognizes as a principle (art. 8) that appropriate measures, provided they are consistent with the provisions of the Agreement,

may be needed to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology. Under a specific provision on control of anti-competitive practices in contractual licences (art. 40), Members agree that some licensing practices or conditions pertaining to intellectual property rights which restrain competition may have adverse effects on trade and may impede the transfer and dissemination of technology, and it is provided that nothing in the Agreement shall prevent Members from specifying in their national legislation licensing practices or conditions that may in particular cases constitute an abuse of intellectual property rights having an adverse effect on competition in the relevant market, or from adopting (consistently with the Agreement) appropriate measures to prevent or control such practices, which may include, for example, exclusive grant-backs, prevention of challenges to validity and coercive package licensing. Article 31 provides for certain conditions to be observed by Members in respect of other use without authorization of the right holder, including both use by the Government or by third parties authorized by the Government (i.e. compulsory licences or forfeiture), including a requirement that such use should be authorized predominantly by Members for the supply of their domestic markets. However, where other use without authorization of the right holder is permitted to remedy a practice determined after judicial or administrative process to be anti-competitive, Members do not have to observe some of these conditions, including the condition relating to predominant supply of domestic markets.

61. The TRIPS Agreement also provides that, for the purposes of dispute settlement, nothing in the Agreement (subject to the provisions on national treatment and most favoured treatment) shall be used to address the issue of the exhaustion of intellectual property rights (art. 6). The exclusive rights of use, sale, importation or other distribution provided for patents by the Agreement (art. 28) are subject to the provisions of article 6. The provisions of the TRIPS Agreement relating to exhaustion of rights should be read in conjunction with articles III and XI (1) of GATT 1994 (already present in GATT 1947), respectively providing for national treatment on internal taxation and regulation and prohibiting in principle quantitative restrictions by contracting parties on imports from, or exports of, goods to another contracting party; these provisions are subject to the general exception clause in article XX for certain types of measures, including measures "necessary" to secure compliance with domestic legislation "not inconsistent" with the Agreement, including those relating to the protection of patents, trade marks and copyright. As discussed in chapter III, in some countries or within some regions, an IPR owner cannot control the subsequent distribution of a protected product after its first sale in the domestic market, but can control importation after first sale in foreign markets. The compatibility of this with the requirements of GATT 1994 would therefore depend upon whether the right to prevent parallel imports was necessary to secure compliance with IPR legislation, and upon whether such legislation was compatible in this respect with GATT 1994. 81/

F. TRIMS

62. The Agreement on Trade Related Aspects of Investment Measures (art. 9), which applies to trade in goods only, forbids investment measures incompatible

with the GATT provisions relating to national treatment and general elimination of quantitative restrictions. Such measures include requirements for foreign investors relating to local content, trade balancing, foreign exchange, or domestic sales. The Agreement provides that, after not less than five years of its date of entry into force, the Council for Trade in Goods shall review its operation and, as appropriate, propose amendments. In the course of this review, the Council shall consider whether the TRIMS Agreement should be complemented with provisions on investment policy and competition policy.

G. Trade in services

63. Article VIII of the General Agreement on Trade in Services (GATS) provides that each Member shall ensure that any monopoly supplier of a service in its territory does not, in the supply of the monopoly service in the relevant market, act in a manner inconsistent with that Member's obligations relating to most favoured treatment of services and service suppliers of member countries and specific commitments (relating to market access, national treatment and other additional commitments 82/). Where a monopoly supplier competes, either directly or through an affiliated company, in the supply of a service outside the scope of its monopoly rights and which is subject to the Member's specific commitments, the Member shall ensure that such a supplier does not abuse its monopoly position to act in its territory in a manner inconsistent with such specific commitments. These provisions also apply to cases of exclusive service suppliers where a Member, formally or in effect, authorizes or establishes a small number of suppliers and substantially prevents competition among these suppliers in its territory. Under article IV, the increasing participation of developing country Members in world trade is to be facilitated through negotiated specific commitments relating inter alia to the improvement of their access to distribution channels and information networks.

64. Under the Annex on Telecommunications, there are specific provisions on access to and use of telecommunications transport networks and services which recognize telecommunications' dual role as a distinct sector and as the underlying transport means for other economic activities. Members have to ensure inter alia that service suppliers of another Member are both: "accorded" access to and use of public telecommunications transport networks and services on reasonable and non-discriminatory conditions for the supply of a service included in its schedule; and "have" such access and use, including by ensuring such suppliers are permitted to purchase or lease and attach equipment interfacing with the network which is necessary for the supply of their services, and to interconnect their private circuits with public or other private networks and services. However, basic telecommunications are exempted from the obligations relating to most favoured nation treatment. **Further** negotiations on this sector * **have failed to reach agreement for the time being, but will be resumed in January 1997**.

65. The Understanding on Commitments in Financial Services enables participants in the Uruguay Round to take on commitments with respect to financial services by means of an alternative approach, including commitments relating to market access and non-discrimination. The Understanding provides for the scheduling of existing monopoly rights, and requires members to

endeavour to eliminate them or reduce their scope. Members are to ensure that financial service suppliers of other Members are to be accorded most favoured nation treatment and national treatment as regards the purchase or acquisition of financial services by public entities in its territory. When membership or participation in, or access to, any organization or association is required or provides privileges or advantages, Members shall ensure that such entities accord national treatment to financial service suppliers of other Members. **Further** negotiations * in this area * **have resulted in an interim agreement without the membership of all parties, and a decision will be taken by December 1997 as to whether there will be fresh negotiations.**

H. Special consultations and dispute settlement rights and obligations

66. In a 1960 decision relating to RBPs in international trade, 83/ the GATT Contracting Parties recognized that RBPs might hamper the expansion of world trade and the economic development of individual countries. They might thereby frustrate the benefits of tariff reduction and removal of quantitative restrictions or otherwise interfere with the objectives of the GATT. International cooperation was needed to deal effectively with RBPs in international trade, although the Decision stated that, in the circumstances at that time, it would not be practicable for the Contracting Parties to undertake any form of control of RBPs or to provide for investigations. Provision was made for consultations among Contracting Parties on a bilateral or multilateral basis as appropriate. The party to whom a request for consultations is addressed is to accord sympathetic consideration to such a request and to afford adequate opportunity for consultations with the requesting party, with a view to reaching mutually satisfactory conclusions. If it agreed that harmful effects were present, it was to take such measures as it deemed appropriate to eliminate these effects. The outcome of any such consultations was to be conveyed to the Contracting Parties. **This consultation procedure is being used in the current dispute between the United States and Japan referred to above.**

67. Under the TRIPS Agreement, two types of procedures for consultations in respect of RBPs are established. On the one hand, a Member is to enter, upon request, into consultations with any other Member having cause to believe that a national or domiciliary of the Member to which the request is addressed is undertaking practices in violation of the requesting Member's legislation on the subject, and which wishes to secure compliance with such legislation; this is without prejudice to any action under the law and to the full freedom of ultimate decision of either Member. The Member to which the request is to be addressed is to supply relevant information, under conditions similar to those under article IX of the GATS, as described below. On the other hand, a Member whose national or domiciliary is subject to proceedings in another Member concerning alleged violations of that other Member's legislation on the subject is to be granted, upon request, an opportunity for consultations by the other Member under the same conditions as the first procedure.

68. There are two separate provisions in the GATS relating to consultations or monitoring. Under the article VIII procedures applicable to monopoly or exclusive suppliers of services, upon receipt of a complaint by another Member, the Council for Trade in Services may request information from a

Member relating to a monopoly supplier's conduct, while Members must notify the Council of grants of new monopoly rights regarding services covered by their commitments. Under article IX (which applies to cases other than those falling under article VIII), Members recognize that certain business practices of service suppliers may restrain competition and thereby restrict trade in services, and undertake to enter into consultations, at the request of any other Member, with a view to eliminating such practices. The Member shall accord full and sympathetic consideration to such a request and shall supply relevant publicly available non-confidential information, as well as other information (subject to its domestic laws and to the conclusion of a satisfactory agreement concerning the safeguarding of its confidentiality). Compared to the 1960 GATT decision applying to trade in goods, the article IX obligations of the GATS do not expressly state that Members should attempt to reach mutually satisfactory conclusions or to take such measures as they deem appropriate to eliminate harmful effects of RBPs. However, it is true that the consultations are with a view to eliminating the RBPs in question, and that there is an obligation to supply information which is not there in the 1960 decision.

69. Under article XXIII of GATT 1994, contracting parties can complain of nullification or impairment of benefits under the Agreement as a result of the failure of another contracting party to carry out the obligations under the Agreement, the application of any measure whether or not it conflicts with the Agreement, or the existence of any other situation. Under the corresponding provision in GATT 1947, a request was made by the European Economic Community in 1983 for the establishment of a panel because the benefits of trade negotiations with Japan had allegedly been nullified and impaired by, inter alia, the concentration and interlinking of the structure of production, finance and distribution in Japan, which made it difficult for foreign suppliers to establish distribution channels. 84/ However, this panel request was eventually dropped, so the questions of whether GATT benefits might be nullified or impaired on such grounds, or of the specific obligations incumbent upon contracting parties in this connection, have never been clarified.

I. Implications

70. The provisions relating to competition policy contained in the Uruguay Round Agreements reflect a realization that, in an increasingly globalized world, national competition policies need to be complemented by action at the international level to protect and promote the vitality of competition in the global market. There has been a substantial encroachment upon the traditional principle that national authorities should only be concerned with the effects of RBPs on their own markets (or, under United States law, with effects upon export opportunities as well). Under GATT 1994 and the GATS, for instance, it appears that obligations are placed upon contracting parties to take measures to control State enterprises and/or enterprises with exclusive rights, with the primary objective of improving market access for firms of other contracting parties, irrespective of whether or not RBP controls might otherwise be necessary to enhance consumer welfare or efficiency - although it is of course true that measures aimed at improving market access for foreign suppliers would often also benefit local consumers and improve efficiency. Moreover, the rules of the international trading system are becoming

increasingly extended to cover conduct by enterprises, and not just by Governments - although it is true that enterprise conduct such as dumping or discrimination by State enterprises or enterprises with exclusive rights was already covered before, and although Governments continue to remain the direct addressees of trade rules. Specific principles that appear to be reflected to a greater or lesser extent in some of the Agreements include the following: Governments should not delegate their powers to regulate their trade (or their markets) to firms; private restraints on trade should thus be controlled (in some areas), or at least not encouraged or supported (in other areas); there should be transparency in this respect; contracting parties should, in applying their competition laws and policies in some areas, take into account the trade interests of other contracting parties, particularly in respect of enterprises with monopoly or exclusive rights; international cooperation is needed to deal effectively with, or eliminate, RBPs restraining international trade; and Governments should therefore consult and cooperate to tackle problems arising in this area. Competition policy obligations are now well integrated into the rules of the international trading system. Given the continuing process of economic globalization, as well as the ongoing process of negotiations in the post-Uruguay Round framework, it is inevitable that competition and trade policies will be brought even closer together.

71. However, the extent to which the different Uruguay Round Agreements reflect competition principles does not appear to be completely uniform. The links with some competition issues are explicitly recognized in some areas, but other competition issues which may arise in these areas do not appear to be covered, while competition issues which may arise in other areas also do not appear to be covered. The TRIPS Agreement has strengthened the rights of IPR holders, but more efforts may be necessary to address the potential for abuse of such rights, as well as to clarify what may be considered to be abuse, both within or outside the context of licensing agreements. There may also be a need to clarify the important questions of exhaustion of rights (including in relation to parallel imports), national treatment, quantitative restraints upon trade and the use of IPRs to facilitate international market segmentation and price discrimination (outside the IP context, the control of price discrimination through anti-dumping measures is authorized by the Uruguay Round Agreements). There may be an asymmetry in the manner in which the TRIMS Agreement forbids trade-distorting investment measures by Governments, but does not address (in contrast with other agreements) RBPs by firms having equivalent effects - however, there is room for further efforts in this respect, given the commitment under the Agreement to consider later whether it should be supplemented by competition policy provisions. *

72. a/ Insufficient account also appears to be taken in the Uruguay Round Agreements of the interrelationships between the competition and trade

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a/ **In its comments on the previous version of this study, the United States Justice Department stated that it contained "... numerous statements about trade laws (e.g. in paras. 73-75) that clearly fall outside the competence of the IGE, and thus should also be deleted". Paras. 73-75 of the previous version of this study correspond to paras. 72-74 of the present version. The Department also requested that paras. 6-8 and 77-81 of the original version be deleted as they contained "many ... objectionable suggestions for multilateral agreements on trade and competition issues"; these paragraphs have been deleted.**

policies practised in importing and exporting countries, and of the manner in which governmental rules and restrictions can facilitate RBPs within the same country. Little account is taken, for example, of the manner in which governmental regulation of the distribution sector can facilitate exclusionary distribution structures and practices (although it is true that the GATS refers to the improvement of developing countries' access to distribution channels and information networks, without specifying the measures necessary for this purpose). Nor is the manner in which trade measures can facilitate collusion between domestic firms, between foreign exporters, or between domestic and foreign producers adequately taken into account, although limited measures are taken in respect of collusion between domestic and foreign producers only (through the conditions established by the anti-dumping agreement relating to price undertakings to settle anti-dumping proceedings). 85/ *

73. **In the anti-dumping agreement and in the Agreement on Subsidies, competition and consumer welfare considerations still do not appear to receive adequate consideration, even though dumping is essentially the same as discriminatory pricing across borders, and even though it is often alleged that it is predatory (similar to the RBP of predatory pricing) *.** It is true that, under * **both these agreements**, competition factors are relevant for determining causality of injury to domestic industry, but there is no requirement that the decision whether or not to grant anti-dumping protection, or what specific remedies to grant, should take into account the effects upon competition in the domestic market. The two agreements also do not adequately address the potential for the abuse of anti-dumping or countervail proceedings to harass exporters. It may be noted in this connection that the OECD Council recommended that care should be exercised that proceedings under laws dealing with unfair trading practices, especially proceedings initiated by enterprises, are not misused for anti-competitive purposes. 86/ The relationship between anti-trust and international trade measures (including anti-dumping, "anti-subsidy" countervailing duties and safeguards), is implicitly recognized in the United States Antitrust Enforcement Guidelines for International Operations 1994. In fact, within the European Union, and in trade between Australia and New Zealand, competition laws or policies are applied instead of anti-dumping measures. However, while competition authorities in some countries may have intervened successfully in some cases to advocate greater attention to competition principles in undertaking trade measures, they have often been unsuccessful, particularly as it is difficult for a country to undertake unilateral efforts in this respect without equivalent efforts by trading partners.

74. To support and complement the efforts of competition authorities at the national level, complementary mechanisms are needed at the multilateral level to address both RBPs affecting international competition **such as "hard-core" export cartels or other collusive practices (which are either presumed to be anti-competitive, subject to some exemptions, or which are not usually subject to extensive economic analysis 87/)**, and protectionist measures by Governments distorting competition and trade. For the latter purpose, trade regimes might be encouraged to draw upon competition policies' greater emphasis upon consumer welfare and efficiency to mitigate the pro-producer bias of trade policies in such areas as safeguards, anti-dumping or countervail of subsidies, thus enabling the "market access" concerns of

both producers and consumers (or exporting and importing countries) to be taken into account. The adoption of a systematic and comprehensive approach to the range of issues in the interface between competition and trade policies, including both private and governmental restraints upon trade, is necessary in order to consolidate and expand upon the progress achieved in the Uruguay Round Agreements in a balanced manner.

75. Following the reduction of governmental trade barriers to be brought about by the Uruguay Round Agreements, efforts to tackle private trade barriers would also be a logical further step, in order to prevent the benefits for competition of trade liberalization from being reduced by the "privatization" of trade barriers - indeed, the lowering of governmental barriers to market entry may leave developing countries in particular more exposed to **cross-border** private restraints **needing to be tackled through international action**. It is likely that the changes in the framework for global competition and trade brought about by the Uruguay Round Agreements, such as the commitment by Governments not to authorize or encourage (but not to prevent) RBPs having effects equivalent to voluntary export restraints or orderly marketing arrangements, **while generally increasing potential competition in international markets,** would * **also lead** enterprises to **increase efforts** * **to circumvent the effects of trade liberalization through resort to RBPs.** Moreover, changes in technology and in marketing strategies may lead enterprises to practise new variations or even new types of RBPs across borders, **whose effects may be reinforced by the continuing trend towards international mergers, joint ventures and strategic alliances.** Taken together with the continuing process of globalization and liberalization, this will make it increasingly essential for competition authorities to have access to information about market operators and market conditions in other countries **(taking into account the issue of information disclosure for the purpose of assessing competition issues, how such disclosure may conflict with the protection of important national interests, and appropriate respect of confidential information and business secrets)**, as well as detailed information about competition laws, policies and enforcement in other countries. **The cases reviewed in TD/RBP/CONF.4/6 confirm that there is a real need for action in this area, as does the case between the United States and Japan pending before a WTO dispute settlement panel.**

76. **The need to take action in the area of RBP control (but not of the competition aspects of trade rules) has been recognized in a communication by the European Commission to the EU Council of Ministers, which suggests that the Community should prepare a position for the WTO Ministerial meeting in Singapore in December 1996, which would propose to WTO Members that a Working Party be established to conduct exploratory work on the development of an international framework of competition rules.** 88/ **The proposal suggests that such a framework could include, in particular, a commitment by all countries to adopt domestic competition rules and enforcement structures, an instrument to allow information to be exchanged between competition authorities of a limited number of countries, an instrument to request action on foreign markets, and an intergovernmental dispute settlement mechanism; the proposal further suggests that OECD and UNCTAD be requested to pursue their work on trade and competition taking account of developments in WTO. ***

Notes

1/ Paragraph I (a) of the Agreed Conclusions states that, in order to assist the Third Review Conference in its work, the Group of Experts requests the UNCTAD secretariat to prepare a draft study on the scope, coverage and enforcement of competition laws and policies in member States and analysis of the provisions of the Uruguay Round Agreements relevant to competition policy, including their implications for developing and other countries, in accordance with the outline as contained in TD/B/RBP/105, and taking into account the comments made during that session of the Group of Experts. See the "Report of the Intergovernmental Group of Experts on its fourteenth session" (TD/B/42(1)/3).

2/ See chapter I of the note entitled "Preparations for the Third United Nations Conference to Review All Aspects of the Set of Principles and Rules for the Control of Restrictive Business Practices" (TD/B/RBP/105).

3/ **See the "Report of the Third United Nations Conference to Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices", 13-21 November 1995, TD/RBP/CONF.4/15.**

4/ **Written comments were received from the Governments of Japan, United Kingdom and the United States.**

5/ See "Basic objectives and provisions of competition laws and policies" (TD/ITD/15). See also "Draft commentaries to possible elements for articles of a model law or laws" (TD/B/RBP/81/Rev.4).

6/ Antimonopoly Law, Decree-Law No. 211, 1973.

7/ Ordinance No. 86-1243 of 1 December 1986 concerning freedom of pricing and competition.

8/ The Law to Promote and Protect the Exercise of Free Competition of 30 December 1991.

9/ Under the Act Against Restraints of Competition of 27 July 1957.

10/ **Information provided by the Japanese Government.**

11/ See National Cooperative Production Act of 1993 (HR 1313), adopted on 10 June 1993.

12/ A unique distinction is made between cooperative and concentrative joint ventures under European law; the latter would be dealt with under the Merger Control Regulation.

13/ Monopoly Regulation and Fair Trade Law 1980, Law No. 3320 of 31 December 1980, and the Enforcement Decree of the Law, No. 10267 of 1 April 1981.

14/ See "Competition and trade in the post-Uruguay Round" (UNCTAD/ITD/11), consultant report prepared for the UNCTAD secretariat by Mr. Kyu Uck Lee.

15/ Ibid.

16/ The Competition and Fair Trading Act No. 18, 1994.

17/ See A.J. Jatar, "Implementing competition policy in recently liberalized economies: the case of Venezuela" (mimeo), Caracas, October 1993.

18/ See "Handbook on Restrictive Business Practices Legislation" (TD/B/RBP/49).

19/ Federal Law on Economic Competition of 24 December 1992.

20/ No. 4064/89, O.J. L 257/13 (1990).

21/ **See "Japan criticizes CD prices", Financial Times, 25 July 1995.**

22/ The Monopolies and Restrictive Trade Practices Act 1969.

23/ See the French/West African Shipowners' Committees and CEWAL Liner Conferences, reviewed in the UNCTAD study on "Restrictive business practices that have an effect in more than one country, in particular developing and other countries, with overall conclusions regarding the issues raised by these cases" (TD/RBP/CONF.4).

24/ See "The role of competition policy in economic reforms in developing and other countries" (TD/B/RBP/96/Rev.2).

25/ See Antimonopoly Office, "Competition law and policy in Poland (1990-1993)", Warsaw, January 1994.

26/ See United States v. Pan American World Airways Inc., 193 F. Supp. 18 (S.D.N.Y. 1961).

27/ See Jatar, op. cit.

28/ Law for Countering Unfair Competition, adopted on 2 September 1993.

29/ See article 92 of the Treaty of Rome. The Treaty also prohibits all restrictions on the free movement of goods and services and all restrictions on freedom of establishment within the common market.

30/ Such as those of the United Kingdom and the United States.

31/ Such as those of France, Germany, Hungary, India, Jamaica, the Republic of Korea, the Russian Federation, Sri Lanka, or Venezuela.

32/ See "Competition and trade ...".

33/ Act on the Prohibition of Unfair Market Practises 1991.

34/ International Association of Machinists and Aerospace Workers v. Organization of Petroleum Exporting Countries, 477 F. Supp. 553 (C.D. Cal. 1979).

35/ See Aluminium Products (1987) 3 C.M.L.R. 813.

36/ Reviewed in TD/RBP/CONF.4/6.

37/ **See Commission decision 907417/ECSC.**

38/ See, for example, section 3 of Zambia's Competition and Fair Trading Act 1994.

39/ See the Fair Competition Act 1993.

40/ Guidelines for the Regulation of Unfair Practices with Respect to Patent and Know-how Licensing Agreements of 15 February 1989.

41/ See "Japan criticizes CD prices", Financial Times, 25 July 1995.

42/ The term trade secrets covers both industrial and commercial know-how. Under the laws of some states of the United States, trade secrets are granted a form of protection analogous to IPRs.

43/ **Racimex Japan Co. and** Jap Auto Products * **Co.** v. BBS Kraftfahrzeug Technik AG (the Aluminium Wheel case), **Tokyo High Court** No. 3272 of 1994. **The case is under consideration on appeal.**

44/ Beecham Group v. International Products Ltd., quoted in D. Gladwell, "The exhaustion of intellectual property rights", 12 European Intellectual Property Review (1986), p. 368.

45/ See U.S. v. Pilkington plc, 7 Trade Reg. Rep. (CCH) 50758 (D. Ariz. 1994) Consent Decree. This case is reviewed in the UNCTAD study on "Restrictive business practices that have an effect in more than one country ...".

46/ **Communication by the United Kingdom Government.**

47/ See K Mart. Corp. v. Cartier Inc., 108 S.Ct. 1811, 6 USPQ2d 1897 (1988).

48/ This term refers to restraints normally warranting per se treatment, as well as other restraints that would almost always tend to reduce output or increase prices.

49/ See Case 258/78 Nungesser v. Commission (1982) ECR 2015 ("Maize Seed"), and the Coditel cases.

50/ See the Tetrapak I case, No. IV/31.043 of 26 July 1988, O.C.J. L 272 of 4 October 1988, p. 27.

51/ **Regulation 240/96 of 31 January 1996, Official Journal 1996 L/31/1. Entry into force on 1 April 1996. ***

52/ See Volvo v. Veng, Case 238/87 (1988) ECJ 6211, and the Renault Maxicar case of 5 October 1988.

53/ See RTE and ITP v. Commission (Magill), Cases C-241/91P and C-242/91, 6 April 1995.

54/ See the Microsoft case, reviewed in TD/RBP/CONF.4/6.

55/ The Law on Counteracting Monopolistic Practices of 1990.

56/ Antimonopoly Office Guidelines for the Application of the Provisions of the Act on Counteracting Monopolistic Practices to Patent Licences and Know-how.

57/ Ahlstrom et al. v. European Commission, (1988) ECR 5193, (1988) 4 C.M.L.R. 901.

58/ See Hartford Fire Insurance Co. v. California, 113 S.Ct. 2891, 2909, (1993). This case is reviewed in "Restrictive business practices that have an effect in more than one country ...".

59/ However, some foreign transactions are exempt from the pre-merger notification requirements of the Hart-Scott-Rodino Act provided they meet certain conditions.

60/ **See United States v. MCI Communications Corp., 7 Trade Reg. Rep. (CCH) 50,761 (D.D.C. 1994) and 59 Fed. Reg. 33009 (27 June 1994).**

61/ **Communication by the United Kingdom Government.**

62/ **See J.M. Finger and K.C. Fung, Can competition policy control 301?, Aussenwirtschaft 49 (1994), p. 379.**

63/ See the Bayer/Firestone case KG Nr. 26 1980 WuW/E OLG, 2419 (Synthetischer Kautschuk II) and the Philip Morris/Rothmans case, 29 October 1985, WuW 6/1986, pp. 481-495.

64/ See the Organic Pigments case (1979) E.C.C. 533.

65/ See François Souty, "Théorie de l'effet: les entreprises des pays tiers et le respect de la concurrence sur le marché européen", Revue de la concurrence et de la consommation, No. 65, p. 6, janv.-fév. 1992.

66/ If criminal penalties are involved, the Chilean law would apply only to RBPs that have taken place in Chile.

67/ See "Handbook to restrictive business practices legislation" (TD/B/RBP/42).

68/ In the Pilkington case, personal jurisdiction over Pilkington was founded on the basis that funds were being transferred to it across United States borders (it was collecting licensing revenue from United States firms).

69/ The article provides that States should seek appropriate remedial or preventive measures to prevent and/or control the use of restrictive business practices within their competence when it comes to their attention that such practices adversely affect international trade, and particularly the trade and development of the developing countries.

70/ See Daishowa International v. North Coast Export Co., 1982-2, Trade Cas. (CCH) 64, 771 (1982). The Webb-Pomerene Act, 15 U.S.C. 61-65 (1988) provides an anti-trust exemption to associations of otherwise competing businesses exporting goods, provided there are no anti-competitive effects in the United States, domestic competitors are not injured, and their statutes and annual reports are filed with the Fair Trade Commission.

71/ Agreement between the Government of the United States of America and the Government of Australia relating to Cooperation on Anti-trust Matters, done at Washington on 29 June 1982.

72/ * **Agreement between the Government of the United States of America and the Government of Canada regarding the application of their competition and deceptive marketing practices laws, done at Washington on 1 August 1995 and at Ottawa on 3 August 1995.** Cooperation in criminal anti-trust cases is also undertaken on the basis of a Mutual Legal Assistance Treaty.

73/ Agreement between the Government of the United States of America and the Government of the Federal Republic of Germany relating to mutual cooperation regarding restrictive business practices. Done at Bonn on 23 June 1976.

74/ Agreement between the Government of the United States of America and the Commission of the European Communities regarding the application of their competition laws. Done at Washington on 23 September 1991. Although the European Court of Justice found that the European Commission did not have the authority to enter into this Agreement, the Agreement is still valid under international law, and has been implemented.

75/ Agreement between the Government of the Federal Republic of Germany and the Government of the French Republic concerning cooperation on restrictive business practices of 28 May 1984.

76/ See the Interim agreements on trade and trade related matters between the European Economic Community and the European Coal and Steel Community, of the one part, and, respectively, the Czech and Slovak Federal Republics, Hungary and Poland, of the other part, done at Brussels on 16 December 1991.

77/ **Euro-Mediterranean Agreement establishing an association between the European Communities and their member States, of the one part, and the State of Israel, of the other part, signed at Brussels on 20 November 1995.**

78/ **North American Free Trade Agreement between the Government of the United States, the Canadian Government and the Government of the United States of Mexico, done at Washington on 8 and 17 December 1992, at Ottawa on 11 and 17 December 1992, and at Mexico City on 14 and 17 December 1992.**

79/ **Revised recommendation of the Council concerning cooperation between member countries on anticompetitive practices affecting international trade, 27 and 28 July 1995.**

80/ The Agreement divides subsidies into those which are "prohibited", "actionable" and "non-actionable".

81/ See on this question A. Yusuf and A. Moncayo, "Intellectual property protection and international trade - exhaustion of rights revisited", World Competition, Vol. 16, No. 1, September 1992, p. 115.

82/ Including inter alia limitations on numbers of service suppliers, value of transactions or assets, or numbers of service operations or output. The provisions relating to market access and national treatment are not general obligations (unlike under GATT 1994), but are exchanged as negotiated commitments with respect to individual sectors or subsectors. Some Members have also notified several sectors to be exempted from the most-favoured nation principle. The GATS provides for appropriate flexibility for individual developing country members in the process of liberalization. Particular account is taken of the difficulties of least developed countries.

83/ Decision of 18 November 1960. See Contracting Parties to GATT, Basic Instruments and Selected Documents (BISD) 28, 170-172, (9th Supp. 1961). The decision has been incorporated into GATT 1994.

84/ See GATT Doc. L/5479. The complaint was qualified as a "situation" complaint.

85/ **Export cartels, for instance, are often created in response to safeguard action, or anti-dumping or countervailing duty proceedings, undertaken by importing countries.** See OECD, "Obstacles to trade and competition", Paris, 1993.

86/ Recommendation of the Council for cooperation between Member countries in areas of potential conflict between competition and trade policies (C(86)65(Final)), 23 October 1986.

87/ **As noted in document UNCTAD/ITD/15, although collusion is subject to an absolute prohibition under some competition laws and a case-by-case analysis under other competition laws, there has been a universal trend towards more severe enforcement against collusion, which would usually be subjected to only a summary examination before it is determined whether it has adversely affected competition. It has been recommended that all countries repeal immunity for export cartels to the extent that such conduct would be unlawful if directed at the domestic market (see American Bar Association, Special Committee Report on International Antitrust 1991), or that export cartels be prohibited subject to an efficiency defence where they can demonstrate that they serve to overcome a genuine barrier to competition in the importing country (see, "Obstacles to trade and competition", op. cit.).**

88/ **Communication submitted by Sir Leon Brittan and Karel van Miert "Towards an international framework of competition rules", of 17 June 1996.**

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WORK PROGRAMME, INCLUDING TECHNICAL ASSISTANCE, ADVISORY AND TRAINING PROGRAMMES ON COMPETITION LAW AND POLICY

Note by the UNCTAD secretariat

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I. INTRODUCTION

1. The present note, prepared by the UNCTAD secretariat, attempts to respond to the requests made by the Third United Nations Conference to Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, in the resolution it adopted on 21 November 1995. 1/ The work reviewed in this note is also in line with UNCTAD's role as defined in the Partnership for Growth and Development 2/ of "examining issues related to competition law of particular relevance to development: continuing analytical work on restrictive business practices; assisting these countries to formulate competition policies and legislation; institution-building; focusing on Africa by holding a regional meeting, creating relevant inventories and databases, and establishing a technical cooperation programme". In particular, the Third Review Conference requested the secretariat "to revise documents TD/RBP/CONF.4/2, TD/RBP/CONF.4/6, TD/RBP/CONF.4/7, TD/RBP/CONF.4/8, TD/B/RBP/81/Rev.4 and UNCTAD/ITD/15 in the light of comments by member States made at the Conference or to be sent in writing by 31 January 1996". A revised version of document TD/RBP/CONF.4/8 is submitted to the Expert Meeting under item 3 of its provisional agenda. As indicated in the provisional agenda and annotations for the Expert Meeting, because documentation is limited to two documents per meeting, it has not been possible for the secretariat to publish revised versions of all the documents in question for the Meeting. Rather, in order to facilitate discussion on these documents, part I of this note contains extracts of the comments received from member States on the relevant documents. Revised versions of these documents will be published in due course, in the light of the Meeting's discussions.

2. In paragraph 8 of the resolution adopted by the Third Review Conference, the UNCTAD secretariat was requested to prepare a "draft outline of a possible study on empirical evidence of the benefits (including benefits for consumers) to be gained by developing and least developed countries and countries in transition from applying competition law and policy principles to economic development in order to attain greater efficiency in international trade and development". Accordingly, part II of this note contains a draft outline of that study.

3. Finally, the Third Review Conference also requested the UNCTAD secretariat, "taking into account increased needs for technical cooperation and technical assistance in developing countries, countries in transition and other countries, to carry out a review of technical cooperation activities undertaken by UNCTAD and other international organizations, as well as States bilaterally, with a view to strengthening its ability to provide technical assistance for capacity-building in the area of competition law and policy by:

(a) Encouraging providers and recipients of technical cooperation to take into account the results of the substantive work done by UNCTAD in the above-mentioned areas in determining the focus of their cooperation activities;

(b) Encouraging developing countries and countries in transition to identify specific competition law and policy areas and issues which they would wish to see receive priority attention in the implementation of technical cooperation activities,

(c) Identifying common problems encountered in the competition law and policy area which might receive attention in regional and subregional seminars;

(d) Enhancing cost-effectiveness, complementarity and collaboration among providers and recipients of technical cooperation, both in terms of the geographical focus of technical cooperation activities, taking into account the special needs of African countries, and the nature of cooperation undertaken;

(e) Preparation and execution of national, regional and subregional projects on technical cooperation and training in the field of competition law and policy, taking special account of those countries, or subregions which have not received such assistance so far, especially in the field of law drafting and staff training, and enforcement capacity;

(f) Mobilizing resources and widening the search for potential donors for UNCTAD technical cooperation in this area;

and to prepare a report thereon" (para. 4 of the Conference resolution).

4. Accordingly, part III of this note contains a progress report on the review, as well as extracts of replies by States to note TD 420/8(5) of the Secretary-General of UNCTAD dated 8 March 1996.

II. COMMENTS RECEIVED BY THE SECRETARIAT ON DOCUMENTS SUBMITTED TO THE THIRD REVIEW CONFERENCE

A. Comments on document TD/RBP/CONF.4/2 on "The role of competition policy in economic reforms in developing and other countries"

United Kingdom

5. "In general, the draft is very balanced and shows much sensitivity to the problems of the developing countries and their need for technical cooperation. We have the following detailed comments:

6. Paragraph 19 contains a methodological discussion on the trade-off between efficiency and consumer welfare. This is an important issue in debate on competition policy. The Office of Fair Trading (OFT) will be publishing a research report on this subject shortly.

7. Paragraphs 44-47 refer to the analysis of vertical restraints. The paper suggests (at para. 47) that it would be useful to have more analysis by UNCTAD of the competition policy treatment of vertical restraints. Should such work be carried out in the future, the secretariat may find useful another research

report to be published shortly by the OFT on vertical restraints, which surveys the latest theoretical developments and which sets out a structure (guidelines) for assessing individual cases.

8. Paragraph 52 refers to regulation by 'price cap'. It may be useful to include into this discussion a statement to the effect that price cap style regulation of the RPI-x type will be less appropriate and more difficult to apply in economies with high interest rates of (RPI) inflation.

9. Paragraph 97 advocates 'common ground' in enforcement of competition law. It is more appropriate to focus on 'common ground' as it exists in the economic analysis methodology in dealing with particular competition issues. This approach is emphasized in paragraph 98."

United States

10. "This is a valuable study. However, it continues to contain broad and vague suggestions in paragraphs 4, 9, 10 and 98 for future work by UNCTAD. (Indeed, it is not at all clear which UNCTAD body would undertake the vast work programme outlined therein.) While many of these proposals may be sound taken individually (e.g. studies of the competition policy of abuses of dominant position (paras. 4 and 98)), given UNCTAD's limited resources, we cannot agree that the IGE (or some other UNCTAD body) should be authorized to undertake all of these studies at this time. In addition, the United States continues strongly to oppose the paper's various formulations of proposals to get the IGE specifically (and UNCTAD generally) involved in trade and competition issues beyond its competence under the Set. Finally, it is quite unclear what is meant by the last sentence of paragraph 7, concerning 'control' of 'investment incentives ... or special protection for foreign investors,' in consultation with competition authorities; that is not a task that many competition authorities currently undertake."

B. Comments on document TD/RBP/CONF.4/6 on "Restrictive business practices that have an effect in more than one country, in particular developing and other countries, with overall conclusions regarding the issues raised by these cases"

Russian Federation

11. "On the whole the study is important and useful and contributes to the achievement of the tasks enumerated in the Set, especially the elimination of RBPs in international transactions.

12. The study contains extensive factual material and interesting conclusions. However, it should be pointed out that the proposals contained in part II of the study, while quite fair, do not follow directly from the material set out in part I, and consequently cannot strictly speaking be termed 'conclusions'.

13. The facts presented in part I provide evidence that at the present stage the Set of Principles and Rules, and also bilateral cooperation, constitute fairly effective means of eliminating RBPs from international transactions.

However, this conclusion should not be viewed as completely objective, since the study analyses only the possibility of the adoption of effective solutions by countries on whose territory so-called RBPs are in effect. The following questions remain open: is a foreign firm's RBP always an RBP in reality, and are countermeasures that are adopted not simply a protectionist defence against foreign competition? It is also necessary to specify whether measures to prevent the strengthening of a dominant market position are the same vis-à-vis domestic and foreign firms. It is obvious that in the absence of an independent body to settle disputes concerning competition, it is difficult to speak of an absolutely fair and transparent system of monitoring RBPs in international transactions.

14. For this reason we consider that the secretariat's research on this issue should be extended and deepened, to serve as a basis for reaching conclusions regarding the desirability of establishing an international system for regulating competition."

United Kingdom

15. "It was agreed at the Conference that future expert meetings should include informal multilateral consultations on competition law and policy issues with a special emphasis on practical cases. We believe that UNCTAD should now concentrate its main efforts on this work and on assisting developing countries in the implementation of competition law and policy rather than attempting to reach a consensus on long analytical policy documents relating to the difficult area of trade and competition.

16. Against this background we consider that further thought needs to be given to the value of continuing work on TD/RBP/CONF.4/5, 4/6, 4/8 and UNCTAD/ITD/15 in their current form. I have however made a number of broad remarks, which will apply to more than one draft paper, as they concern general policy principles. I have also included some detailed comments on some of the papers.

General comments on papers TD/RBP/CONF.4/5, 4/6, 4/8

Proposals for developing binding competition rules

17. The papers make a number of references to the need for the application of competition rules on the international level and possible convergence of national competition policies.

18. Any consideration of binding multilateral rules should take into account evidence of the need for such rules as well as the risks and benefits of such rules.

19. Cooperation and convergence should be seen as complementing each other, rather than as alternatives. The OECD has made significant progress in identifying areas of difference and areas of common principles which can help members move their laws and policies towards common patterns. However, it is important to consider whether any currently perceived problems are caused by

divergence in various countries' competition laws or whether in fact they are caused by the failure of one country to apply its legislation consistently, or by the adoption of regulations in particular market sectors which have anticompetitive effects.

20. One should not underestimate the difficulties involved in the process of legislative or procedural change. For example, serious consideration needs to be given to the issue of information disclosure for the purposes of assessing competition issues and how such disclosure may conflict with the need to protect important national interests. Equally important is the need to ensure that confidential information and business secrets are treated with appropriate respect.

Use of the term 'hard-core' and whether a consensus is emerging for the prohibition of hard-core arrangements

21. Hard-core arrangements normally refers to arrangements which have no redeeming features. Use of the term begs the question as to whether a particular arrangement does or does not have redeeming features.

22. We understand that the United States law treats price fixing and market allocation as per se objectionable but we believe that this does not mean that they treat such agreements as never having any redeeming features. Rather, we understand that they consider that such arrangements normally do not have such features and so a full case-by-case market analysis is only required if it can be shown that some redeeming features are present. The EC permits exemption for arrangements if there are benefits to consumers or to Community interests.

23. There therefore does not appear to be a consensus that all price fixing or market sharing arrangements should be prohibited without the possibility of exemption or case-by-case analysis.

Lifting of government barriers likely to be followed by private restraints

24. It is suggested that as government barriers to trade are removed under the Uruguay Round they are likely to be replaced by private restraints. Government barriers to trade frequently act as barriers to entry to the relevant market for competition. Hence as government barriers are removed, any private restraints seem likely to be less not more easy to sustain.

Private restraints are currently acting as significant barriers to trade

25. It is suggested that private restraints are currently acting as a significant barrier to international trade. No doubt in certain areas private restraints do restrict trade but we are not aware of evidence that this is a significant problem. We believe that in general, government regulations such as statutory monopolies, standards and restrictive trade measures are the main sources of restrictions on trade access. To the extent that private restraints do not act as a barrier to trade they may be sustainable only because of government regulation.

26. Specific moves to abolish State monopolies are referred to in TD/RBP/CONF.4/8 in paragraph 28. This is a fairly innovative development and one which is increasingly being taken up by more and more countries. It is a trend which relates to the review of the Set, so more could be made of it in future studies.

Effect of foreign direct investment

27. There appears to be a presumption at many points in the papers that foreign direct investment is likely to lead to the creation of a monopoly situation. In general, foreign investment will create alternative sources of supply and hence seems likely to promote and not to restrict competition.

EC law and effects doctrine

28. It is argued that there is little difference between EC and United States jurisprudence in relation to the effects doctrine. In Ahlstron v Commission, the European Court of Justice overturned a decision by the European Commission and accepted that there was jurisdiction only because the agreement in question was implemented in the Community. The Court's judgement therefore distinguishes 'implementation' in the Community from the 'effects' doctrine as espoused by the United States law. It is only under the United States interpretation of the 'effects' doctrine that agreements which produce some substantial effect in the United States without being implemented there such as those cited in the Hartford Fire Insurance case are regarded as falling within United States jurisdiction. The exercise of extraterritorial jurisdiction by the United States in this case was challenged by the United Kingdom and we would ask that you insert this statement into the text.

Extraterritorial jurisdiction

29. The improper assertion by a State of jurisdiction over non-nationals in respect of events occurring wholly outside the sovereign territory of the State is an important issue for the United Kingdom. We are particularly concerned in this respect about any use by countries of their competition policy to promote their trade interests. It is not clear that the action taken in the Pilkington case could be judged to have a pro-competitive effect from the point of view of domestic markets outside the United States or that the arrangements which Pilkington agreed with its sub-licences considerably restrained competition in those markets."

United States

30. "This document contains much useful information and many useful insights. But it also contains some factual inaccuracies about United States law and some observations with which we do not agree. First, the discussion of the Hartford Fire case in paragraph 5 (b) states that our Supreme Court ruled that 'abstention from exercising ... jurisdiction for comity considerations was to be contemplated only if there was a true conflict between United States and foreign law;' a similar statement appears on page 17. As our 1995 International Guidelines state (at p. 21), the Court did not make such a decision; rather, it ruled only that as to one comity factor, conflict with

foreign law, 'no conflict exists ... if the person subject to regulation by two States can comply with the laws of both'. Second, the discussion of the ZF/Allison case in paragraph 11 (b) states that the German Federal Cartel Office issued a formal prohibition order before the United States Justice Department took action. That is true, but it is also true that the Department ultimately challenged the transaction in court - while the Cartel Office's order was on appeal in Germany - and that the firms then called off the transaction.

31. Third, on page 15 the note states that '[t]here is as yet no consensus as to what a comprehensive, optimal competition law should look like'. This statement certainly supports the secretariat's recent view that the Model Law or Laws should remain a work in progress.

32. Fourth, page 15 also suggests considering a 'modest initiative for a binding international agreement to outlaw hard core horizontal restraints'. For the reasons suggested in the previous paragraph on page 15 - among others - the United States cannot agree with this suggestion. Nor can we agree with the suggestion on page 16 that countries should repeal statutory export cartel exemptions; as the United States has stated on prior occasions, export cartel exemptions obviously do not apply in foreign countries, which are free to enforce their competition laws against such cartels.

33. Finally, consistent with our traditional position, the United States would oppose the amendments to the Set contemplated in the last sentence of the text on page 19."

C. Comments on document TD/RBP/CONF.4/7 on "Feasibility study of developing a bibliography and database on RBPs"

Russian Federation

34. "The document is a rather thorough and comprehensive study of the possibility of developing a database on RBPs, which would undoubtedly facilitate the efforts of participating countries in eliminating the negative features of RBPs. While we broadly support the proposal for the establishment of such a database, we consider that a number of practical suggestions are called for.

35. With a view to the more rational use of resources, we regard as undesirable the development of a database on legislation. We suggest confining efforts to a bibliographical database and one on decisions, as agreed at the fourteenth session of the IGE on RBPs. We suggest that information on current antimonopoly legislation should be built up in printed form through the publication of special reference guides based on information received from member countries.

36. In view of the limited resources available, it would be advisable to maintain only a database on decisions relating to international transactions drawing on information submitted by each country which has adopted a decision in this area. The original language should be used for the bibliography and the decisions.

37. As the bibliographical archive will presumably also include material containing economic analysis, we suggest that the name of the system should be changed to 'UNCTAD Multinational Information System Relating to Competition', with corresponding changes in paragraphs II.6, II.9 and elsewhere in the text. It is not completely clear what criteria underlie the proposal that the bibliographical database should be a selective one. In our view, the database should be comprehensive in nature.

38. The database should be universal and contain all information of interest, i.e. not only the texts of documents but also, for example, information on countries where similar norms have been adopted, where enforcement practices are similar, and so on. The database should be continuously updated.

39. In view of the interest of many countries in the creation of a comprehensive information system on competition, it will be possible to expand this database in the future by adding a section on legislation, and also to use the database as a starting-point for the establishment of a computer network for easy handling of the required information.

40. In this regard, we consider that it is necessary to address the question of technical assistance for connecting all the users to the Internet system."

United Kingdom

41. "At the Third Review Conference, the United Kingdom stated that it could not support this project in its present form. We previously expressed, both orally and in writing, a number of serious concerns about the proposed database. These included doubts about the extent to which the database would be used, the likely extent of its coverage, the ability of the database to be funded out of existing budgets and its maintenance to be self-funded, the means of distribution, language as a barrier to use and copyright ownership of the materials which it is proposed should be included in the database.

42. In addition to these concerns, it has been the United Kingdom's experience, in our assistance to countries setting up their competition policy, that a danger exists that reference to precedents can be used to set policy, upon the basis that as another country had found a particular practice in a certain industry anticompetitive, the same would apply elsewhere. Unless the content of the database concentrates on principles and techniques of investigation rather than decisions, at the best, it will not be used and at the worst, it is likely to produce more harm than good."

United States

43. "The proposals for creating a database vastly exceed UNCTAD's resources and (at least as to the United States) would merely duplicate much of the vast amount of public information on competition law matters."

D. Comments received on document TD/B/RBP/81/Rev.4 "Draft commentaries to possible elements for articles of a model law or laws"

Japan

44. Paragraph 74 should read: "In Japan, for example, Old Parr Co. (the sole Japanese agency for Old Parr Whisky) instructed its agents not to supply whisky to dealers who imported Old Parr whisky from other sources, or who sold the products supplied by Old Parr Co. at less than the Company's standard price. It devised a special checking mark for packaging supplied by its agents in order to detect any dealer not complying with its requirements. The Japanese Fair Trade Commission investigated the case and found that such action constituted an unfair business practice and accordingly ordered Old Parr to discontinue its practice. 112/"

45. Paragraph 136, third sentence, should read: "In countries such as Brazil, Germany, Hungary, Japan, Lithuania, Mexico, Norway, Pakistan and the Russian Federation, and in the EC, the administrative bodies have powers to impose fines or administrative surcharges." The reason is that in Japan, the Fair Trade Commission, an administrative organization, has no authority to impose criminal "fines". It has authority to impose administrative surcharges. This represents not a penalty but collection of extra profits.

46. Paragraph 139, last two sentences, should read: "In Japan, the administrative surcharge was introduced in 1977. Under this legislation, an administrative surcharge of US$ 80 million was imposed by the Japanese Fair Trade Commission on a cement cartel in 1991. The rate of the administrative surcharge was raised to 6 per cent (in principle) of the total sales of a participant of a cartel during the period in which the cartel was effectively enforced, also in 1991."

47. Footnote 169 should read:

169/ "Competition Policy in OECD Countries 1991-1992" (p. 239).

because it is more appropriate to cite an official source such as "Competition Policy in OECD Countries 1991-1992" (p. 239, attached) than citing BNA.

United Kingdom

48. This study is almost concluded. The United Kingdom has commented extensively on it in the past; we are pleased with its high quality and expect it to be a useful document. We have the following minor drafting suggestions:

Page 6 - Definitions

I (b) The definition of a dominant position of market power when applied collectively should not be limited to "a few other enterprises". For example, trade associations can have many enterprises.

I (c) The United Kingdom's position on the definition of the relevant market is that this should include supply-side substitution where this is practical (this is picked up in para. 12, p. 16).

Page 8 - II. Acts or behaviour considered as abusive - (a)

49. In the United Kingdom's approach to predatory behaviour, we are not convinced that predatory behaviour is capable of being an abuse without a definition of what such behaviour is. In particular, the theoretic work we have carried out indicates that "below cost pricing" is not the standard upon which to assess predation. (OFT research report on predation refers.)

Page 8 - II (b)

50. In the United Kingdom, price discrimination can in some circumstances be regarded as a manifestation of competition and in other circumstances as anticompetitive. However, the distinction is far from obvious.

Page 8/9 - Mergers

51. It seems very difficult in administrative terms to propose purely "effects" - based merger legislation.

United States

52. On the apparently generally accepted theory that the commentaries on the Model Law are a work in progress, I have no further comments on this draft at this time. The secretariat seems to have taken into account our comments on the last draft, which I conveyed in my letter to you dated 30 November 1994.

E. Comments received on document UNCTAD/ITD/15 on "The basic objectives and main provisions of competition laws and policies"

United States

53. As stated at the Review Conference, this study covers many concepts, and does so very well. It deserves to be discussed in more detail at the next IGE meeting.

II. DRAFT OUTLINE OF A POSSIBLE STUDY ON EMPIRICAL EVIDENCE OF THE BENEFITS (INCLUDING BENEFITS FOR CONSUMERS) TO BE GAINED BY DEVELOPING COUNTRIES AND LEAST DEVELOPED COUNTRIES AND COUNTRIES IN TRANSITION FROM APPLYING COMPETITION LAW AND POLICY PRINCIPLES TO ECONOMIC DEVELOPMENT IN ORDER TO ATTAIN GREATER EFFICIENCY IN INTERNATIONAL TRADE AND DEVELOPMENT

54. It is proposed that the study should mainly focus upon the beneficial effects of competition policy for allocative, static and dynamic efficiency, and for consumer welfare. Little attempt would be made to go into other socio-economic effects that competition policy may also have (and which competition policy in different countries may also aim at), except for some discussion of the concepts of competitiveness and of total welfare (which covers both consumer and producer welfare).

55. In the first part of the study, the advantages of competitive markets, in comparison with monopolistic or oligopolistic markets, would be described, and available empirical evidence discussed, in terms of each of the following: efficient and flexible prices and resource allocation; encouragement of market entry; a greater variety of cheaper and/or better quality goods and services for consumers (though price flexibility may sometimes lead to higher prices, at least in the short term); cheaper and better-quality intermediate inputs for user industries, resulting in their greater competitiveness; the positive role of interfirm rivalry as an incentive towards greater efficiency; encouragement for research and development and the creation of new production processes and new products; and the role of competition in determining the success of industries and firms involved in international trade. The extent to which there may be exceptions to the above-mentioned advantages of competition, such as the encouragement of technological innovation by market concentration, large firm size or intellectual property protection, would be covered in this context, and it would be assessed whether these really constitute exceptions to the benefits of competition. For the purposes of this part, the study would rely upon available quantitative and qualitative evidence relating to the effects of reduced competition and/or market concentration on the one hand, and market contestability on the other, upon economic performance in several developed and developing countries. Examples might be taken, for example, from the West African shipping market, and from a few economic sectors in the Republic of Korea, or from studies on the Dutch or Swiss economies.

56. The second part of the study would focus on the benefits to be obtained from the adoption of an explicit competition policy, relying upon data from actual cases or experiences in member countries (such as the ATT case, the deregulation of the airline industry in Australia or the United States, or the deregulation of utilities or local bus transport in the United Kingdom), as well as studies on market structure and performance in such countries as Malaysia, the Republic of Korea and the United Kingdom. Distinctions would be made where appropriate as to the effects of competition policy in sectors already exposed to competition from imports and those not so exposed, in competitive markets and markets with some natural monopoly characteristics, and in markets which are fully liberalized and those which are subject to some regulatory restrictions. The study would also describe cases indicating where it appears that inappropriate enforcement action by competition authorities may have been detrimental to efficiency and consumer welfare.

57. The study would note the difficulties involved in isolating the effects of competition policy from other government policies (such as privatization) or from economic or technological changes in the industry examined, as well as the paucity of data relating to ex post facto monitoring exercises relating to the effects of enforcement action against RBPs. The study would call for more data or case studies from developing and developed countries relating to the effects of the application of competition law and policy. Such data might include, for example:

(1) A description of the structure, conduct and performance characteristics of the market affected by anticompetitive practices (number and characteristics of domestic suppliers, intensity of competition from foreign producers, etc.);

(2) Modalities of intervention used by the competition agency to deal with the case (through enforcement proceedings or through a competition advocacy role);

(3) Short-term and (where applicable) medium- to long-term effects of the competition policy intervention with regard to consumer welfare or firm or industry performance.

III. PROGRESS REPORT ON A REVIEW OF TECHNICAL COOPERATION ACTIVITIES

A. Technical cooperation provided by UNCTAD since the Third Review Conference (November 1995)

58. It should be noted that the main types of requests for technical assistance received by UNCTAD are as follows:

(a) States without any competition legislation may request information about restrictive business practices, their existence and possible adverse effects on their economy. This may involve a study of the restrictive business practices in their economy;

(b) States without competition legislation may request introductory seminars directed at an audience including government officials and academics, as well as business and consumer-oriented circles;

(c) States which are in the process of drafting competition legislation may request information on such legislation in other countries, and seek advice as to drafting their competition legislation;

(d) States which have just adopted competition legislation may seek advisory services for the setting-up of the competition authority; this usually includes training of officials responsible for the actual control of RBPs, and may involve training workshops and/or on-the-job training with competition authorities in countries having experience in the field of competition;

(e) States which have already adopted such legislation and have experience in the control of RBPs may wish to consult each other on specific cases and exchange information; seminars may be organized for such exchanges between competition authorities;

(f) States which wish to revise their competition legislation might seek expert advice from competition authorities in other States, so as to amend their laws in the most effective manner possible.

59. Accordingly, since the Third Review Conference, which took place on 13-21 November 1995, the UNCTAD secretariat has undertaken the following technical cooperation activities:

December 1995

- Organization of a national Competition Seminar in Lusaka (Zambia), at which experts from Kenya, South Africa and the United Kingdom exchanged views with the Zambian Authorities on the recently adopted Zambian Competition Act in view of the establishment of a Competition Authority;

- Seminar on "Enforcement of National Law on Competition and Restrictive Business Practices", organized by the German Foundation for International Development (DSE), in cooperation with UNCTAD, the German Federal Cartel Office and the Monopoly Control Authority of Pakistan;

- Participation in the First National Seminar on Competition Policy for the Republic of Paraguay;

- Advisory services for the preparation of the draft competition law of Paraguay;

- Advisory services related to the preparation of the draft competition law of Bolivia;

- Commentary on the draft competition law of Panama (the law was adopted shortly thereafter).

January 1996

- Further advisory services to Bolivia on the draft competition law, as well as draft law on consumer protection and unfair competition.

March 1996

- Preliminary discussions with the Government of Guatemala about the need for drafting competition legislation;

- Discussions with the Permanent Secretariat of the General Treaty on Central American Economic Integration (SIECA) about the need for a technical cooperation project on competition for the Central American countries members of SIECA.

April 1996

- Advisory services on draft Competition Law of Guatemala;

- Further advisory services provided to Bolivia on revised draft of Competition law, consumer protection law, and law on the repression of unfair competition.

May 1996

- Advisory services to Colombia on the drafting of regulations for implementing the Act on Free Competition;

- Advisory services to the Government of Peru concerning the setting-up of regulatory authorities for privatized sectors;

- Participation in the VIth Session of the Interstate Council for Antimonopoly Policy of the Commonwealth of Independent States (CIS) in Almaty (Kazakstan);

- Visit to the Commission for the Promotion of Competition of Bulgaria.

June 1996

- Organization and participation in a Symposium on Competition Policy and Legislation for the Government of Malawi, with the participation of an expert from South Africa;

- Seminar on Competition Policy and advisory services for the Government of Honduras;

- Seminar on Competition Policy organized by the German Foundation for International Development (DSE) in cooperation with UNCTAD, on an exchange of experiences between the German Federal Cartel Office and the newly set-up Competition Authority of the Republic of Costa Rica;

- Seminar on Restrictive Business Practices organized by UNCTAD in Havana (Cuba) with the participation of competition experts from Chile and Venezuela.

July 1996

- Commentary on the draft legislation for the reform of the Antimonopoly Act of Chile.

August 1996

- Advisory services to the Government of Colombia on regulations for implementation of the Competition Act;

- Advisory services to the Government of Guatemala on the draft Competition Law;

- Commentary on the draft Competition Law and consumer protection law of Paraguay;

- Participation in the Conference on Competition Policies and Economic Reforms organized by the Peruvian Competition Authority (INDECOPI) in Lima (Peru);

- Presentation of the work of UNCTAD to the second meeting of the Working Group on Competition Policy of the Free Trade Area of the America (ALCA) in Lima (Peru);

- Advisory services to the Government of the Dominican Republic on the preparation of a draft competition law and consumer protection law.

September 1996

- Advisory services to the Government of Honduras on draft competition legislation and technical assistance project;

- Participation in international seminar on competition policy organized by the Fair Trade Commission of the Republic of Korea in Seoul (Republic of Korea).

B. Technical cooperation undertaken by other international organizations, as well as States bilaterally

60. Below are extracts of the replies received so far to note TD/420/8(5)Q of 8 March 1996 of the Secretary-General of UNCTAD requesting information in this area.

Bulgaria

Section I

61. The Commission for Protection of Competition (CPC) of the Republic of Bulgaria was established on the basis of the Law on Protection of Competition (LPC) passed by the Great National Assembly in May 1991. It is an independent body financed by the State budget and consists of a Chairman, two Deputy-Chairmen and eight members who are elected and discharged by the National Assembly. Pursuant to the LPC and in compliance with the functional organization pattern of the CPC, a working body at the CPC was established by a decision of the Council of Ministers. This working body has the task of supporting the work of the CPC, assisting in the expedient implementation of its decisions, and securing administrative-economic support for it.

62. In fact the CPC started its activities at the end of October 1991. Although it was a relatively new authority, it succeeded in establishing very good contacts with the respective units and bodies of some big international organizations, such as UNCTAD, OECD, EU and EFTA, as well as with authorities of different countries, both industrially developed, such as the United States of America, Germany, France and Japan, and countries in transition, such as Russia, the Czech Republic, Slovakia, Hungary, Poland, Romania, Kazakstan, Ukraine, Belarus, etc. Representatives of the CPC managing body regularly participate in the work of the Intergovernmental Union for Antimonopoly Policy of the CIS countries.

63. Concerning the technical assistance provided or intended to be provided by the CPC for the period 1995-1997, it has to be taken into account that no direct technical assistance in terms of financial support has been provided, nor does it seem likely to be provided in the near future, because of the limited budget of the CPC and the financial and other material difficulties that the Commission itself is facing.

64. However, in the form of technical assistance, especially mutual exchanges with the Central and East European countries and CIS, the CPC has built up very useful and mutually beneficial relations which allow not only for the exchange of practical experience but also for the exchange of views and for discussions on legal regulations and supplementary regulations in the field of competition policy and legislation. A substantial role in this aspect was played by:

- The Agreement signed by the Governments of Bulgaria and the Russian Federation for cooperation in the field of antimonopoly policy;

- The Agreement between the Commission for Protection of Competition of the Republic of Bulgaria and the Ministry of Economic Competition of the Czech Republic for cooperation in the field of economic competition;

- The bilateral Agreements and Memoranda for cooperation in the field of competition protection signed by the CPC and the respective authorities of Hungary, Slovakia, Romania, Ukraine and Moldova.

65. The Management of the Commission for Protection of Competition of the Republic of Bulgaria has always declared that, in spite of its moderate practical experience, the CPC has highly qualified specialists and will readily, as required, provide counselling according to its competencies in the field of:

- Drawing-up of legal regulations and supplementary regulations related to competition;

- Development of methodological guidebooks, analyses and methodologies required for tackling various problems related to competition policy and practice.

Czech Republic

66. In May 1996, the Ministry of Economic Competition of the Czech Republic (MEC), in conjunction with the European Commission, organized the Competition Policy Conference in Brno, Czech Republic. The participating countries were countries that have already signed their Association Agreements with the European Union - the Czech Republic, the Slovak Republic, Poland, Hungary, Romania, Bulgaria, Estonia, Latvia, Lithuania and Slovenia. The Conference discussed both competition and state aid issues and focused especially on the transition period exigencies in the area of competition law.

67. The Department of Justice of the United States (DOJ) and the Federal Trade Commission (FTC) organized two practical seminars for the staff at MEC: in October 1995 - Investigative Practices Seminar (abuse of dominance) and in March 1996 - Cartel Detection Seminar.

68. A Seminar on European Competition Law organized by the Trier Academy of European Law took place in September 1995 in Brno.

69. The German Foundation for International Legal Cooperation organized for the staff at MEC a Seminar on Media Concentration in December 1995, with a follow-up seminar in 1996.

70. The European Commission (DG IV) organized collective training for antimonopoly officials from Central and Eastern Europe in Brussels in September/October 1995. The programme consisted of two-weeks' training at DG IV, followed by two weeks placement at antimonopoly offices in various member countries of the European Union.

Germany

71. The Federal Cartel Office's (FCO) technical cooperation activities consist mainly of advice and information provided both in house and in the countries concerned. These activities are largely financed by outside funds made available, inter alia, by private associations and foundations.

72. Delegations seeking information, etc., on German competition law, the structure and function of the FCO and privatization issues came from the following countries (excluding the EU and the United States of America):

1995-May 1996	No. of visitors	
Ukraine	20	
Korea	4	
Belarus	1	
Japan	4	
China	11	
China	13	
Slovak Republic	2	for 1 week
Malaysia	3	
China	15	
Brazil	6	
Czech Republic	1	for 2 weeks
Bulgaria	2	for 2 weeks
Lithuania	1	for 2 weeks
Viet Nam	4	
China	20	
Japan	4	
Russia	25	
Ukraine	28	
China	20	
Japan	3	
Argentina, Paraguay, Chile	20	
Bulgaria	2	for 2 weeks
Hungary	10	
Republic of Korea	3	

73. Delegations from the following countries have - so far - been scheduled to visit the FCO in the period June 1996-1997:

El Salvador	9 visitors
China	20 visitors
Russia	For 1 week
Paraguay	
Finland	For 2 months

74. Since 1995 a member of the Federal Trade Commission of Korea has been with the FCO for further training (until the end of 1996).

75. Members of the FCO have rendered technical cooperation services in the following countries:

1995-May 1996

Bolivia	4-day Seminar on Improved Enforcement of National Competition Laws in Bolivia
Pakistan	1-week Seminar on Enforcement of National Laws on Competition and Restrictive Business Practices
Ukraine	5-day Competition Law Conference
Viet Nam	1-week Seminar on German Competition System
Hungary	2-week seminar
Kazakstan	2-day seminar on introducing a competition system
Peru	1-week stay to give advice on competition law enforcement

76. Visits by the FCO in 1996 are scheduled for: Costa Rica, Sri Lanka, Bulgaria, Brazil; visits in 1997 are scheduled for: Papua New Guinea, Mongolia, Bulgaria.

Mexico

77. Technical cooperation on competition law and policy provided to other States at the bilateral or multilateral levels during the 1995-1997 period was as follows:

(a) Cooperation:

- In the framework of technical cooperation between Mexico and Nicaragua, a staff member of the Federal Commission on Competition (Mexico's Competition Authority) visited Managua on 28-29 March 1996 to advise the Government in the field of competition law and policy;

- Two staff members of the Technical Unit of the Commission to Promote Competition of Costa Rica visited Mexico City on 29 April-6 May 1996 for training in the area of competition law and policy.

(b) Assistance or requests for assistance by Mexico in the area of competition law and policy:

- During the last two years, staff members of the Federal Commission on Competition received training in the area of competition law and policy in Canada, the United States, Spain and the OECD;

- Irrespective of the interest indicated by the Federal Commission on Competition to receive technical assistance from other countries, there is at present no specific request pending in this area.

Pakistan

Technical cooperation on competition law and policy

78. A three-day seminar on the Enforcement of National Laws on Competition and Restrictive Business Practices was held on 4-6 December 1995 in Islamabad. It was organized jointly with the German Federal Cartel Office, UNCTAD, and the German Foundation for International Development. In this seminar, national laws of Germany and Pakistan were discussed in detail.

79. Participants included officials of the Federal Cartel Office of Germany, officers of the Monopoly Control Authority, representatives of other government departments and private organizations, and representatives of UNCTAD and the German Foundation. Participants were of the view that the experience gained will help them greatly in implementation of the respective laws. UNCTAD is requested to hold such seminars in future also. The seminar was funded by the German Foundation for International Development and the Monopoly Control Authority, Government of Pakistan, Islamabad.

Sweden

80. From 1994 to July 1996, the Swedish Competition Authority received study visits from the authorities of a number of countries including Hungary, Slovakia, the Baltic States, Poland, Slovenia, Russia and China. The purpose of these visits was to give technical assistance on legislation, institutional framework and enforcement issues. The duration of the visits varied from half a day up to two weeks.

United States

81. During 1995 and 1996, the United States federal antitrust agencies (the Department of Justice and the Federal Trade Commission) thus far have: (1) provided long-term advisors to the Latvian, Lithuanian, Polish, and Romanian competition agencies, respectively; (2) sent one or more short-term technical cooperation missions to Albania, the Czech Republic, Hungary,

Jamaica, Latvia, Lithuania, Moldova, Poland, Romania, the Russian Federation, Slovakia, Slovenia, Ukraine, and Venezuela, respectively; (3) hosted as interns competition officials from Albania, Hungary, Lithuania, Poland, Romania, and Venezuela, respectively; (4) hosted two conferences in Vienna for competition officials from 11 Central and Eastern European countries; and (5) participated in OECD competition seminars in Istanbul, Paris, St. Petersburg, and Vienna. Nearly all the expenses of these technical cooperation activities were funded by the United States Agency for International Development.

Notes

1/ Resolution contained in annex I to the Report of the Conference (TD/RBP/CONF.4/15).

2/ Midrand Declaration and a Partnership for Growth and Development (TD/377), para. 91 (iii).

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TRADE AND DEVELOPMENT BOARD
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and Related Financial Issues
Expert Meeting on Competition Law and Policy
Geneva, 13 November 1996
Item 3 of the provisional agenda

CONSULTATIONS ON COMPETITION LAW AND POLICY, INCLUDING THE MODEL LAW AND STUDIES RELATED TO THE PROVISIONS OF THE SET OF PRINCIPLES AND RULES

Communication received from the Organization for Economic Cooperation and Development

Note by the UNCTAD secretariat

The following three subjects are proposed by the OECD countries for the consultations to be held under item 3 of the provisional agenda:

1. The pros and cons of resale price maintenance;

2. Confidentiality requirements in competition investigations;

3. Competition policy and its application to public monopolies.

Other countries willing to propose issues for consultations during the Expert Meeting on Competition Law and Policy are requested to inform the UNCTAD secretariat as a matter of urgency.

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